RIGHTS WITHOUT REMEDY:* THE MYTH OF STATE COURT ACCESSIBILITY AFTER THE PRISON LITIGATION REFORM ACT

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INTRODUCTION

With few exceptions,[1] prisons in the United States developed without public scrutiny, access, or oversight.[2] American society continues to tolerate and be entertained by the violent, inhumane, and exploitative conditions that exist in prisons.[3] For more than a century,

* Drawing on the Latin maxim *ubi ius, ibi remedium*, where there is a right, there is a remedy.

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1 *See, e.g.*, GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1964) (studying, in 1831, the developing prison system in the United States to inform the expansion of the French prison system). Regarding the experiment on the effects of isolation, de Tocqueville and Beaumont observed:

> The unfortunates, on whom this experiment was made, fell into a state of depression . . . one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.

Id. at 41.

2 *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (explaining that institutional isolation, coupled with prisoner surveillance, was a preferable disciplinary method to public spectacle).

3 Several classic films depict the brutality of incarceration. *See, e.g.*, SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994) (featuring a sadistic warden, corrupt prison officials, and prisoner rape and abuse in Maine in the 1950's and 1960's); AMERICAN HISTORY X (New Line Cinema 1998) (featuring prison gangs, racial violence and prisoner rape in California in the early 1990's); COOL HAND LUKE (Warner Bros. Pictures 1967) (depicting an alcoholic serving his sentence in a Florida chain gang in the early 1950's); *see also* LET'S GO TO PRISON (Universal Pictures 2006) (a comedy demonstrating the continuing viability of prison-themed films).

Frequent references in popular culture demonstrate that mainstream society accepts that prisoner rape is an almost certain violence from which most incarcerated people will suffer. *See, e.g.*, Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 563 (2006) (setting forth examples of how prison rape jokes are socially acceptable and quoting the California Attorney General saying at a press conference that "he would 'love to

despite intermittent appeals for intervention, courts refused to recognize that prisoners were protected by the Constitution and permitted these conditions to flourish.[4] For example, through the 1970's, Texas prisoners served as armed guards and terrorized other inmates.[5] In 1976, a district court declared that most of Alabama's prisons were "unfit for human habitation."[6] In 1978, a federal judge was "shocked" by the "dark, dirty, and totally isolated" psychiatric quarters in certain Pennsylvania prisons and ruled that the conditions "constitute[d] treatment so inhumane and degrading as to amount to cruel and unusual punishment."[7]

The judicial expansion of civil rights in the 1960's enabled litigants to bring complaints against prisons and finally persuaded federal courts to intervene.[8] Courts began to remedy unconstitutional, unsanitary, inhumane, and degrading prison conditions through ongoing enforcement.[9] Except for limited legislative involvement,[10] court-ordered improvements were what sparked reform in the once-closed prison systems.[11]

personally escort [Kenneth] Lay to an eight-by-ten cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'").

4 *See infra* note 38 and accompanying text (describing the "hands off" doctrine).

5 Ruiz v. Estelle, 503 F. Supp. 1265, 1294-98 (S.D. Tex. 1980) (describing the "building tender" system in Texas prisons in the 1970s where armed inmates served as official guards within the prison); *see also infra* notes 53-55 and accompanying text describing similar problems in the Arkansan system challenged in *Holt v. Sarver*, 309 F. Supp. 362 (D.C. Ark. 1970).

6 Pugh v. Locke, 406 F. Supp. 318, 323-24 (M.D. Ala. 1976) ("[A] United States public health officer [testified that] . . . if such facilities were under his jurisdiction, he would recommend that they be closed and condemned as an imminent danger to the health of the individuals exposed to them."), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (dismissing some defendants on Eleventh Amendment immunity grounds).

7 Imprisoned Citizens Union v. Shapp, 451 F. Supp. 893, 898 (E.D. Pa. 1978). These psychiatric cells were called "the Glass Cage" and had no furniture, no natural or inside lighting, insufficient ventilation, and strong odors. The judge commented after two visits: "[W]e were genuinely shocked by the dark, dirty, and totally isolated conditions we observed." *Id*.

8 THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004) (describing the landmark rights-protecting precedents set by the Warren Court); *see also* discussion *infra* Part II.A.

9 David C. Leven, *25 Years After Attica*, N.Y. L.J., Sept. 19, 1996, at 2 (finding that litigation in New York State and nationwide produced improved prison conditions); *see also* Susan L. Rhodes, *Prison Reform and Prison Life: Four Books on the Process of Court-Ordered Change*, 26 LAW & SOC'Y REV. 189, 215 (1992) (deeming litigation "valuable" in "increas[ing] . . . the visibility of institutional conditions").

10 A 1971 riot at New York's Attica Prison, which ended when State Police stormed the prison and killed 39 people, also dramatically exposed a failing prison system and prompted the New York legislature to create a commission to study prisons in New York. Leven, *supra* note 9; *see also* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2018 n.95 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*] (describing the impact of the Attica Riot on improving prison conditions).

11 *See, e.g.*, Ruiz v. U.S., 243 F.3d 941, 953 (5th Cir. 2001) (Garza, C.J., specially concurring) ("The fact that a consent decree was entered into shows that the conditions in the prisons of Texas needed to be addressed. . . . I am sure that the conditions that existed when the consent decree was entered no longer exist . . . ."); *see also* cases cited *infra* note 96 (listing

However, jail and prison populations have ballooned since courts began to intervene, undercutting many of the positive changes that institutional reform litigation achieved. A February 2008 report by the Pew Center revealed that one in one hundred American adults were incarcerated in either prisons or jails at the start of 2008, an unprecedented rate that costs states $50 billion per year and surpasses all other nations in both prison population and per capita incarceration rates.[12] Increasing sentence lengths,[13] the expanding criminalization of drug-related offenses,[14] and national cutbacks in community-based mental health services[15] significantly contribute to America's incarceration rates. The jail and prison systems cannot manage such massive rates. Overcrowding and shortages in staff, services, and resources have caused many jails to regress back to uninhabitable and inhumane conditions.[16]

Consequently, prisons continue to require major reforms.[17] For example, a 2003 complaint described how conditions in solitary

consent decrees entered into in each federal circuit).

[12] PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. The United States now has an incarcerated population of over two million people. *Id.* at 7. At the end of 2006, 1,377,815 people were incarcerated in state prisons, 193,046 in federal prisons, and 766,010 persons were awaiting trial or serving a sentence in local jails. *Id*. at 26, 29. *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CORRECTIONS STATISTICS (2007) [hereinafter DOJ CORRECTIONS STATISTICS 2007], *available at* http://www.ojp.usdoj.gov/bjs/correct.htm#findings.

[13] MELVIN DELGADO, WHERE ARE ALL THE YOUNG MEN AND WOMEN OF COLOR?: CAPACITY ENHANCEMENT PRACTICE IN THE CRIMINAL JUSTICE SYSTEM 31 (2001) ("Approximately 67 percent of the increase in the prison population is considered to be the result of increased sentencing time . . . .").

[14] *See, e.g.*, MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOC'Y 13 (Sept. 2007), *available at* http://www.sentencingproject.org/Admin/Documents/publications/dp_25yearquagmire.pdf.

[15] *See, e.g.*, DEPT. OF POLICY & LEGAL AFFAIRS, NAT'L ALLIANCE ON MENTAL ILLNESS, A GUIDE TO MENTAL ILLNESS & THE CRIMINAL JUSTICE SYSTEM 1 (1995), *available at* http://www.nami.org/Template.cfm?Section=Issue_Spotlights&template=/ContentManagement/ContentDisplay.cfm&ContentID=60725 (reporting that people with serious mental illness are overrepresented in the criminal justice system).

[16] *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982) ("Overcrowding can cause increased violence . . . it may dilute other constitutionally required services such that they fall below the minimum Eighth Amendment standards, and it may reach a level at which the shelter of the inmates is unfit for human habitation.") (internal citations omitted); Tyson v. Grant County Sheriff**,** No. 1:07-CV-0010**,** 2007 WL 1395563, at *1, 3 (N.D. Ind. May 9, 2007) (alleging that overcrowding in the Grant County jail causes three prisoners to sleep in two-prisoner cells, limits recreation, increases tension and violent fights between the prisoners, affects food rations, and prevents jail personnel from adequately ensuring inmate safety).

[17] *See, e.g.*, Jamie Fellner, *Prisoner Abuse: How Different are U.S. Prisons?*, HUMAN RIGHTS WATCH, May 14, 2004, http://www.hrw.org/english/docs/2004/05/14/usdom8583.htm. ("In American prisons today, wanton staff brutality and degrading treatment of inmates occur across the country with distressing frequency.").

housing[18] in an Indiana prison caused inmates with mental illness to "engage in self-abusive behaviors, including ripping chunks of flesh from their bodies; rubbing feces on themselves; staring fixedly in their cells; and attempting suicide."[19] A 2004 class action suit in the Central District of California declared that as many as 500 detainees slept on the floor of the Los Angeles county jail on a given night, tracking 24,688 instances of floor-sleeping over a four month period.[20] While litigants had previously petitioned courts for assistance, the Prison Litigation Reform Act now limits what federal courts can contribute to institutional reform.

To clear federal court dockets and relieve state prison systems from supervision by federal judges,[21] Congress enacted the Prison Litigation Reform Act of 1995[22] (hereinafter "PLRA" or "the Act"). The Act contains various provisions that screen and dismiss prisoner complaints for frivolity or failure to exhaust administrative remedies in order to prevent individual prisoners from overusing federal courts.[23] This Note analyzes a provision of the Act that significantly limits the scope of relief a federal judge may grant to remedy a complaint against an entire prison system or a correctional facility.[24]

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[18] Complaint, Mast v. Donahue, 2:05-CV-0037 (S.D. Ind. Feb. 3, 2005) [hereinafter *Mast v. Donahue Complaint*], *available at* http://www.aclu.org/FilesPDFs/indiana%20dep't%20of%20corrections%20complaint.pdf. The complaint contests conditions in the prison's Secured Housing Unit (SHU). *Id.* at 1. In other jurisdictions, SHU denotes "special housing unit" and is also commonly referred to as "the hole," "the box," or "solitary confinement." Sol Wachtler, Op-Ed., *A Cell of One's Own*, N.Y. TIMES, Sept. 24, 2006, § 14, at 11.

[19] *Mast v. Donahue Complaint*, *supra* note 18, at 7. These same reactions have been observed in solitary units in New York State. Wachtler, *supra* note 18 (citing interviews conducted by the Correctional Association of New York).

[20] Thomas v. Baca, 514 F. Supp. 2d 1201, 1208-09 (C.D. Cal. 2007).

[21] Various circuits conclude that the Prison Litigation Reform Act (PLRA) did not intend to burden states beyond what is required by law. *See, e.g.*, Plyler v. Moore, 100 F.3d 365, 375 (4th Cir. 1996) (determining, *inter alia*, that Congress' purpose in enacting the PLRA was "namely, to relieve states of the onerous burden of complying with consent decrees that often reach far beyond the dictates of federal law").

[22] Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523 (2006); 18 U.S.C. §§ 3624, 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. §§ 1997-1997h (2006)). The Act was signed into law by President Clinton in 1996. 1 BERNARD D. REAMS & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at vii (1997).

[23] *See* 28 U.S.C. § 1915(g) (2006) (curtailing "frivolous" suits); 28 U.S.C. § 1915A (2006) (mandating that judges screen and dismiss invalid prisoner complaints before or right after docketing the case); 42 U.S.C. § 1997e(a) (2006) (requiring prisoners to exhaust administrative remedies before progressing to federal courts).

[24] *See* 18 U.S.C. § 3626(a)-(b) (2006) (limiting prospective relief to remedy a constitutional violation by breadth and duration); *see also* 42 U.S.C. § 1997e(d) (2006) (limiting plaintiff's counsel's rate to 150% of the rate paid in each federal district court to court-appointed counsel). Senators and House Representatives expressed strong rhetoric about curbing activist federal judges during the limited debate on the PLRA. *See, e.g.*, 141 CONG. REC. H14078-02 (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("Title VIII will provide much needed relief to States

The Act altered the landscape of prison reform litigation. Prisoner litigants had previously resolved prison conditions suits through consent decrees—a hybrid contract-court order negotiated by the parties and then enforced by a court.[25] The PLRA discourages consent decrees by limiting the scope of provisions to which the parties can agree and requiring detailed court findings before a court can implement them, much like litigation on the merits.[26] Because the PLRA explicitly does not apply to or bind state courts,[27] the Act incentivizes the parties to negotiate and settle their complaints with the terms of such agreements only enforceable in state court.[28] These kinds of claims have rarely been brought to state court and will likely force litigants and judges to create a new body of law to resolve institutional reform contract cases.[29]

This Note argues that the purported availability of state court jurisdiction to adjudicate prison conditions complaints is a critical justification of the PLRA's limit on federal court intervention, but that state courts ultimately offer few, if any, remedies for institutional reform litigation.[30] Part I.A discusses the historical interrelation of prisoner litigants and federal courts, detailing the development of prison reform litigation. Part I.B describes how Congress enacted the PLRA to

dealing with the problems of unreasonable Federal court intervention in the operation of prisons and frivolous litigation by prisoners. For too long, Federal judges have been attempting to micromanage correctional facilities throughout the country. Judicial intervention in local prison management has often resulted in the release of dangerous criminals."); 141 CONG. REC. S14408-01 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts.").

[25] See ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK-CIVIL § 74:13 (4th ed. 2007):

> [A consent] decree [is] entered in an equity suit on consent of both parties. It is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court. In effect, it is an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved.

See also infra Part I.A (discussing the development and use of consent decrees as a means of resolving prison conditions complaints).

[26] *See* discussion *infra* Part I.B (explaining specific PLRA provisions restraining prospective relief). Litigation exposes both parties to risks. Plaintiffs might not be able to present a factual record of constitutional violations—on which the court must make a finding to maintain jurisdiction of the case. Defendants risk that the court will find constitutional violations that plaintiff prisoners will later utilize in individual damages actions. In addition, even assuming that constitutional violations are found, a court is restrained in the remedies it can offer—it cannot approve or supervise any relief that goes beyond remedying the narrow constitutional violation. Before the PLRA, as long as the parties agreed to an outcome, such risks and restraints did not apply.

[27] *See* 18 U.S.C. §§ 3626(c)-(d) (2006) (clarifying that the Act does not bind state courts).

[28] 18 U.S.C. § 3626(c)(2)(A) (2006) (permitting parties to enter into "private settlement agreement" so long as "the terms of that agreement are not subject to [federal] court enforcement other than the reinstatement of the civil proceeding that the agreement settled").

[29] As discussed *infra* Part II.B, contracts are typically subject to state common law. Thus, it is unlikely that state courts will look to the precedent of three decades of constitutional litigation in federal courts for assistance in resolving contract disputes.

[30] Discussed *infra* in Part I.B.2.

halt this development and Part I.C examines how federal courts have handled preliminary objections to various PLRA provisions. Part I concludes that, as a consequence of the Act's restrictions on relief, litigants, who had historically chosen to resolve litigation through negotiated relief, will again choose to settle their disputes by negotiating agreements in federal court and voluntarily dismissing them. These agreements are then only enforceable in state court as contract claims. Part II analyzes barriers that litigants face enforcing their contract claims in state court,[31] surveying immunity laws, specific performance issues, and state analogs to the PLRA. As both plaintiffs and defendants often choose to settle through private agreement, Part II urges litigants and judges to consider the availability of state subject matter and remedial jurisdiction when deciding between settling and litigating prison conditions suits.

While this Note anticipates a problem (that state courts will not adequately remedy institutional reform settlements negotiated in federal court), it does not propose a solution. Instead, this Note recommends that litigants file these cases in state court to determine if these courts will exercise the subject matter and remedial jurisdiction[32] that Congress envisioned in the Act. Institutional defendants who had willingly negotiated settlements in federal court might fight to preclude state court jurisdiction upon breach,[33] confirming the drawback to creating unenforceable agreements.[34] Even if institutional defendants

[31] This Note analyzes actions initiated in federal courts that will ultimately move into state courts upon breaches of agreements. Many points of the discussion are also germane to direct state claims about conditions of confinement.

[32] Though Black's Law Dictionary conflates the two types of jurisdiction, this Note distinguishes between subject matter jurisdiction—a court's ability to hear a particular type of case, and remedial jurisdiction—a court's ability to provide the relief that litigants propose. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining subject matter jurisdiction as "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things"). The Act limits both types of jurisdiction in federal court. Subject matter depends on a judge finding a constitutional violation and remedial jurisdiction is confined in scope.

[33] *See infra* Part II.B.1.

[34] Three decades of prisoner litigation demonstrate that institutional defendants often will breach their agreements in serious ways. Accounts from the era of the consent decree provide the best measure for assessing if institutional defendants will maintain the terms of their agreements. *See, e.g.*, Morales v. Turman, 569 F. Supp. 332 (E.D. Tex. 1983) (creating a monitoring committee to oversee systemic improvements in the Texas Youth Commission over a four year term, buttressed by ongoing court supervision). In approving the parties' settlement agreement, the judge noted:

> [L]egal instruments are executed precisely because good faith and social mores are often insufficient to insure that promises are kept, and to make certain that the precise contours of given promises are fully understood by the promisors and the promisees. The trust accorded the current state defendants on the basis of their present good faith must be tempered, nonetheless, by the recognition that personnel will inevitably change, and that, just over a decade ago, many of the individuals who then comprised the officialdom of TYC, and at least one of the attorneys who represents them,

accept a state court's jurisdiction, judges might not accept jurisdiction or award remedies commensurate with the plaintiffs' bargain.[35] Federal court dockets will again swell if cases dismissed by way of private settlement agreements return to federal court for full litigation on the merits, or if fewer litigants agree to dismiss through private settlement agreements. Without actual data detailing the problems with federal court limitations on prospective relief shifting emphasis to state courts, Congress is not likely to reconsider the severity of the Act.[36]

I. STATE PRISONS, FEDERAL COURTS AND CONGRESS

A. *Federal Court Intervention*

1. The Development of Section 1983 Litigation to Remedy Poor Prison Conditions

The Supreme Court's expansion of the scope of Section 1983 litigation during the civil rights era made federal courts available to assess and remedy prisoner civil complaints about prison conditions.[37]

> unregenerately and callously endeavored to preserve and perpetuate debased, execrable institutions in which juveniles were tortured and terrorized. Further, few or none of the asserted reforms regarding the conditions of confinement affecting the class were placed in operation before the orders of this court.

Id. at 334 (citation omitted).

[35] *See infra* Part II.B.2.

[36] In February 2007, the Criminal Justice Section of the American Bar Association urged Congress to amend certain PLRA provisions. *See* Legislative Update Letter from Bruce Nicholson, ABA Criminal Justice Section, to Stephen A. Saltzburg, Chair & Jack Hanna, Staff Director, ABA Criminal Justice Section (Dec. 20, 2007), *available at* http://www.abanet.org/crimjust/legislativeupdate.pdf. In late 2007, two Congressmen introduced various amendments to the PLRA, one of which would free consent decrees from the need-narrowness-intrusiveness limitations. *See* 110 CONG. REC. H13295-05 (daily ed. Nov. 7, 2007) (statement of Rep. Scott) (proposing to strike paragraph (1) of subsection (c) of 18 U.S.C. § 3626). As of October 2008, the bill amending the PLRA had ten co-sponsors in the House of Representatives and no corollary bill in the Senate. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.04109: (last visited Oct. 7, 2008). While the bill lacks the legislative support to move forward, the amendment creates a forum to document and analyze problems with the Act's limitations on prospective relief. For example, a House Judiciary subcommittee held a meeting on April 22, 2008, where advocates submitted comments on other PLRA provisions in consideration for repeal. *The Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. (2008).

[37] 42 U.S.C. § 1983 (2006) (granting federal courts jurisdiction to hear claims arising out of alleged constitutional violations by government agencies). The expansion of prisoners' ability to utilize the federal courts was a product of *Monroe v. Pape*, 365 U.S. 167 (1961), a suit against Chicago police officers for the conduct that violated both the Fourth Amendment and state laws (recognizing that existence of a state law remedy does not deprive Federal Courts jurisdiction over complaints of alleged constitutional violations). *See also* STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS, § 2.4 (2007) (describing the breadth of *Monroe*'s

For at least a century, courts had maintained a "hands-off" policy towards prisoner litigants.[38] In the 1960's, the Supreme Court expanded the constitutional rights available to criminal defendants, and applied those rights to the states.[39] During this period, the Supreme Court also extended many constitutional protections to prisoners and made federal courts available to hear their constitutional claims.[40] Even when the Supreme Court retracted the scope of the rights it granted, lower federal courts remained open to deciding prison conditions cases.[41] Aside from

holding as providing significant expansion of § 1983 suits).

Prisoners may also access federal courts through other statutory means, including: (i) Section 1985 suits, a conspiracy corollary to § 1983 suits; and (ii) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination of otherwise qualified handicapped individuals. *Id.* § 4:8-4:10, 4:21.4. The Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C. § 12101-12213, also provides a means for prisoners to sue. *See, e.g.*, U.S. v. Georgia, 546 U.S. 151 (2006) (holding that a disabled inmate in a state prison may sue the state for money damages under Title II of the ADA, 42 U.S.C. § 12132).

[38] *See, e.g.*, Ruffin v. Commonwealth, 62 Va. 790 (1871) (considering prisoners as "slaves of the State" without any right to court intervention); *Ex parte* Pickens, 101 F. Supp 285, 290 (D. Alaska 1951) (refusing to intervene to alleviate inmates confined in an overcrowded firetrap that was "inexcusable and shocking to the sensibilities of all civilized persons"); Gore v. U.S., 357 U.S. 386, 393 (1958) (Frankfurter, J.) ("In effect, we are asked to enter the domain of penology . . . . This Court has no such power."). Arguments about separation of powers and concerns about frustrating penal objections justified the "hands-off doctrine." Note and Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515-17 (1963).

[39] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against self-incrimination); Chimel v. California, 395 U.S. 752 (1969) (protection against unreasonable and warrantless search and seizure). For a review of other important advances in criminal law for defendants during this period, see Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 893 nn.1-4 (1977).

[40] In the wake of the civil rights movement, federal courts abandoned the "hands-off doctrine." *See, e.g.*, Cooper v. Pate, 378 U.S. 546 (1964) (holding that Muslim inmates had standing to challenge denial of religious texts in prison under 42 U.S.C. § 1983); Bounds v. Smith, 430 U.S. 817 (1977) (holding that inmates have a constitutional right to court access, imposing on states an affirmative obligation to provide adequate legal libraries and assistance).
As a result federal courts witnessed an explosion of § 1983 actions from prisoners: while prisoners filed only 218 actions under Section 1983 in 1966, notably 9,730 were filed in 1978. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 611 (1979). In addition, a rapidly expanding prison population and manifestly barbaric conditions fostered an increase in the number of suits brought under Section 1983. *Id.* at 611. In 1992, the Administrative Office of the U.S. Courts recorded 26,824 suits filed by prisoners under this section. US DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 1-2 (1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf.

[41] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 669-70 (1977) (determining that while prison brutality is a proper subject for the Eighth Amendment scrutiny, prisoners must meet the high standard of unnecessary and wanton infliction of pain); Wilson v. Seiter, 501 U.S. 294, 304-05 (1991) (holding that deprivation of an "identifiable human need such as food, warmth, or exercise" must be accompanied by a sufficiently culpable state of mind to qualify as cruel and unusual punishment); Peter Keenan, *Constitutional Law: The Supreme Court's Recent Battle*

the substantive law that brought prisoner litigants to federal court, procedural factors, such as an expansive discovery practice, also made federal courts the preferred forum for challenging prison conditions.[42] In addition, because of appointment and lifetime tenure, federal judges are historically considered less biased than their state counterparts, a benefit to indigent and marginalized groups.[43] Consequently, because prisoner litigants so often proceed directly to federal court, state actions are comparatively untested and undertheorized.[44]

Aside from reliance on federal courts, prison conditions cases have a unique character because of the distinctive relationship between the

Against Judicial Oversight of Prison Affairs, 1989 ANN. SURV. AM. L. 507 (1991) (discussing Supreme Court decisions deferring to prison administrators); Alexander Williams, Jr., *Court-Ordered Prison Reform: An Argument for Restraint,* 34 HOW. L.J. 559 (1991) (concluding that lower federal courts have not appropriately followed Supreme Court deferential standards for judging prison issues).

[42] Expansive discovery practice in federal court, bounded by what is "relevant to the subject matter involved in the [pending litigation]," compels many plaintiffs to choose a federal forum. *See* FED. R. CIV. P. 26(b)(1); *see also* CIVIL TRIAL MANUAL 179-234 (1976) (urging advocates to use the powerful tools that federal civil procedure provides, including the rules on scope, depositions, written interrogatories, document production, physical examinations, requests for admission, and available sanctions). In addition, federal courts use notice pleading, which is less onerous than fact pleading. Fact pleading is required by seventeen states, some with the largest prisoner populations in the country. STEINGLASS, *supra* note 37, § 8:2 n.1. Many of these procedures might also be preferable to defendants. *Cf.* STEINGLASS, note 37, § 8:4 (stating that federal court rules about Doe defendants make it more difficult to amend complaints to add new defendants ascertained through the discovery process); *Id.* § 8:8 (finding that state courts generally have more lenient interim relief rules than federal courts).

[43] Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120-21 (1977); *see also* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239 (1988) (discussing how the question of state court bias dates back to the Constitutional convention where, for example, James Madison argued that "state judges, who were likely to be biased against federal law, could not be trusted and that appeal to the Supreme Court was inadequate to protect federal interests"). *But see, e.g.*, Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 GEO. L.J. 941, 943 (2004) (reviewing the study on federal court treatment of gay rights in DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (Cambridge University Press 2003) and concluding, *inter alia,* that the myth of federal court insulation from ideological manipulation should be reconsidered).

[44] *See, e.g.*, STEINGLASS, *supra* note 37, § 1:1 (acknowledging the "conventional wisdom" that federal courts are superior in this context, but encouraging lawyers to consider that in some cases, "state courts *may* be the preferred forum"); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1562 (2003) [hereinafter Schlanger, *Inmate Litigation*] (focusing an empirical study on federal filings because "little information about state court cases is available"); Turner, *supra* note 40, at 613 (concluding that federal district courts account for the most action in prisoner civil rights complaints and are the most sympathetic forum for these claims). In addition, any state court case based on Section 1983 can be immediately removed to federal court. *See* 28 U.S.C. § 1441 (2006). *But see, e.g.*, Brad H. v. City of New York, 729 N.Y.S.2d 348 (Sup. Ct. 2001) (securing jail and community-based discharge planning services for the forensic mentally ill based on provisions in New York City's Mental Hygiene law); George v. Goldrick, 518 N.Y.S.2d 582 (Sup. Ct. 1987) (utilizing New York State's Article 78 administrative appeal to challenge unconstitutional overcrowding in Rockland County jail); Farrell v. Allen, No. RG 03079344 (Alameda County Super. Ct. Jan. 16, 2003), *available at* http://www.prisonlaw.com/pdfs/farrellcd.pdf (employing California's taxpayer standing rule to sue the California Youth Authority for illegally expending taxpayer funds).

parties in typical prison litigation—plaintiff prisoners and defendant institutions. The very nature of imprisonment generates constant contacts with state actors.[45] This ongoing relationship suggests that once a court finds constitutional violations inside a prison, the traditional legal remedy of money damages could not sufficiently remedy the problem.[46] Thus, litigation which sought long-lasting reform necessarily invoked the equitable jurisdiction of federal courts.[47]

2. The Use of Consent Decrees to Remedy Unconstitutional and Inhumane Prison Conditions

Either at the request of litigants[48] by recommendation of appointed experts,[49] or at their own initiative,[50] federal judges started to use equitable remedies to correct constitutional violations.[51] Over the years,

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[45] Justice Stewart perhaps best explained this close relationship between the prisoner and the state:

> The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

[46] Ongoing injunctive relief is typically necessary to stop entrenched behaviors, ongoing policies and practices that violate the Constitution. *See, e.g.*, Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1978). ("[T]he constitutional violations [involving the District of Columbia jails] are alleged to have actually affected the entire, clearly defined plaintiff class and to have stemmed from continuing policies of the Department of Corrections, so that only injunctive relief classwide in scope can effectively end the multiple and continuing wrongs."); *see also* Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The* Benjamin v. Malcolm *Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3, 53-54 (2007-2008) ("The ability of plaintiffs to come to the court and urge compliance is why the Benjamin consent decrees have been so effective in the long term. In cases like Benjamin, violations once remedied can backslide and become a violation of rights once again. This was most strikingly obvious in instances of sanitation and overcrowding throughout the years . . . [O]nly a consent decree . . . provides for the necessary oversight to ensure success in protecting the rights of the disenfranchised as guaranteed by the Constitution.").

[47] Robbins & Buser, *supra* note 39, at 894.

[48] *See, e.g.*, Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 347 (1968) ("Prisoners, having real or imagined grievances, cannot demonstrate in protest against them . . . . The only avenue open to the prisoners is taking their case to court.").

[49] *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 365 (D.C. Ark. 1970) (relying on the expert testimony of a former Director of the Federal Bureau of Prisons, as well as other expert reports).

[50] *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 162-71 (1998) (arguing that judges imposed national norms on the plantation prisons of the south).

[51] *See* BLACK'S LAW DICTIONARY 609 (8th ed. 2004) (defining equitable remedy as "a remedy, usu[ally] a nonmonetary one, such as an injunction or specific performance, obtained when available legal remedies, usu[ally] monetary damages, cannot adequately redress the injury").

the specificity of the equitable remedies increased, while deference to prison administrations decreased.[52] For example, in 1970, an Arkansas district judge declared the entire state's prison system unconstitutional[53] but ordered minimal, open-ended changes. The court gave Arkansas officials six weeks to submit a report outlining how *they* would bring the penitentiary system up to constitutional standards, including removing inmate "trusties"[54] from power, making solitary cells sanitary and modifying the open barracks used for sleeping.[55] In 1980, based on a 1972 suit against the Texas Department of Corrections (TDC), a federal judge authored a 125-page opinion ordering the TDC to address overcrowding, inadequate security, inadequate healthcare, unsafe working conditions, and severe and arbitrary disciplinary procedures.[56] Instead of deferring to prison officials, the judge ordered the TDC to change to a small managerial system to ensure its operations conformed to statutory and constitutional law.[57]

Once courts were willing to intervene to remedy unconstitutional and inhumane prison conditions, litigants negotiated their own terms through consent decrees—contractual arrangements that would be monitored by the courts.[58] Consent decrees eliminated the risks, high costs, and fact-finding elements of litigation.[59] Plaintiffs also preferred

[52] *See* Gilmore v. People, 220 F.3d 987, 992-94 (9th Cir. 2000) (distinguishing between first generation prison conditions cases, which brought conditions up to constitutional compliance, and second and third generation cases, in which prison officials agreed to wide ranging modifications with court supervision instead of litigating).

[53] *Holt*, 309 F. Supp. at 381 ("However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today as the Twentieth Century goes into his eighth decade.").

[54] Trusties were the prisoners chosen to guard over other prisoners, saving the prison system the cost of employing free-world personnel. Trusties were armed and often selected for their willingness to "shoot to kill" an inmate who tried to escape. DAVID H. ROSENBLOOM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION AND LAW 230 (2d ed. 1997).

[55] *Holt*, 309 F. Supp. at 385.

[56] Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980).

[57] *Id*. at 1388.

[58] See *supra* note 25 (defining consent decrees). Consent decrees retain elements of contract and judicial order, though whether the two components can be separated is debated. *Compare* Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) ("[B]ecause their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts."), Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 47 (1987) (explaining that the difference between litigation terminated by notice of dismissal or by consent decree is where and how the breach may be resolved), *see also id.* at 53 n.32 (citing A. C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, § 1350 at 2773 (5th ed. 1925)) (holding that a consent decree is a private contract between parties), *with* 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.409[5], at III-151 (2d ed. 1996) ("The judgment is not, like the settlement agreement out of which it arose, a mere contract *inter partes*. The court is not properly a recorder of contracts; it is an organ of government constituted to make judicial decisions, and when it has rendered a consent judgment it has made an adjudication.").

[59] Litigation over constitutional violations in prisons often generates massive records. For example, the trial in *Ruiz v. Estelle* lasted 159 days, included testimony from 349 witnesses, and the court received approximately 1,565 exhibits, 503 F. Supp. at 1276; *see also* Shima Baradaran-

consent decrees for their ability to institute remedies that went beyond correcting constitutional violations,[60] benefited prisoners that were not parties to the litigation,[61] and utilized court resources to effectuate the terms of such agreements.[62] Consent allowed defendants to circumvent admitting a constitutional violation or having plaintiffs prove a constitutional violation.[63] Courts preferred and encouraged settlements in complex class-action and institutional litigation cases.[64]

While institutional defendants and plaintiff prisoners frequently opted to settle through consent decrees, these agreements faced heavy criticism. Consent decrees limited state penal policy and prosecutorial discretion[65] and were blamed for escalating prison costs.[66] Federal

Robison, Comment, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. REV. 1333, 1339-41 (2003) (describing incentives to enter into traditional consent decrees); Schlanger, *Beyond the Hero Judge*, *supra* note 10, at 2011 ("By settling, the parties preempted the need for the judge to make liability findings, issue remedial orders, or both. Settlements do not require formal proof or legal argument.").

[60] *Local No. 93, Int'l Assoc. of Firefighters*, 478 U.S. at 525 ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

> Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires . . . but also more than what a court would have ordered absent the settlement. (citations omitted).

Id. at 389 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)).

[61] Institutional reform cases modifying prison conditions necessarily affect third parties. This explains heightened judicial scrutiny in resolving such class action cases. Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1036-37 (1986).

[62] Gilmore v. People, 220 F.3d 987, 995 (9th Cir. 2000) (explaining that the court enforces decrees through the appointment of special masters, imposition of sanctions for contempt, or modification and expansion of relief when defendants are in breach).

[63] This factor is a major bargaining point for institutional defendants because a finding of a constitutional violation exposes them to individual damage suits. *See* Leven, *supra* note 9.

[64] *See, e.g.*, Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981).

[65] Judges commonly remedied unconstitutional levels of overcrowding by imposing a population cap at a facility. Ross Sandler & David R. Schmahmann, *Empowering Local Lawmakers: The Prison Litigation Reform Act*, CATO INSTITUTE, Feb. 10, 1997, http://www.cato.org/dailys/2-10-97.html (stating that twenty-four prison agencies were "chafe[d] under population caps"). Prosecutors would be forced to be more moderate in deciding what cases to prosecute and what sentences to recommend when prison systems neared the judge-ordered capacity. *See, e.g.*, Sarah B. Vandenbraak, *Bail, Humbug!: Why Criminals Would Rather Be in Philadelphia,* 73 POL'Y REV. (Summer 1995), *available at* http://www.hoover.org/publications/policyreview/3565992.html (arguing that a federal court-issued population cap for local jails created a situation of lawlessness, including high rates of drug dealing and fugitives); *see also* 141 CONG. REC. H1472, 1479 (daily ed. Feb. 9, 1995) (statement of Rep. McCollum) ("[F]ew problems have contributed more to the revolving door of justice than Federal court-imposed prison population caps.").

[66] *See, e.g.*, 141 CONG. REC. S18295-96 (daily ed. Dec. 8, 1995) (statement of Sen. Abraham)

judges were criticized for exceeding their powers and usurping state executive functions.[67] The increasing number of federal suits from inmates and federal court willingness to award broad equitable relief in prison litigation had two consequences: federal court orders substantially improved state prison systems[68] and active intervention by federal judges in state prison systems provoked a heated state reaction.[69] In 1995, Congress responded.

B. *The Prison Litigation Reform Act*

1. Limiting the Remedies Available in Prison Conditions Cases

The PLRA, one of the 104th Congress's judicial reforms,[70] altered

("[J]udicial orders entered under Federal law are . . . raising the costs of running prisons far beyond what is necessary."). *But see* Karen Firestone, *Impact of Prisoner Litigation Reform Act on Michigan Prison Costs* (1998), *available at* http://www.senate.michigan.gov/sfa/Publications/Notes/1998Notes/Maap98kf.html (concluding that, absent court intervention, much of the $93 million per fiscal year spent on consent decrees would still be necessary to cover the costs of security and health staff necessary to adequately care for and guard prisoners).

[67] *See, e.g.*, *infra* note 90 (quoting Congressional speeches in support of the PLRA). While federal judges enacted sweeping changes to individual and entire prison systems, prison administrators did not always resist such reforms. *See, e.g.*, Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 469-70 (2004) (explaining that prison administrators might welcome the increased resources available after a consent decree and the corresponding increase in their ability to maintain order).

[68] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 681-83 (1978) (eliminating use of hand-cranked shock device, lashing with leather strap, uncontrolled rape and inmates guards authorized to use deadly force in Arkansas penal system); *see also* Ann H. Matthews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 537 n.10 (2002) (citing additional materials that substantially improved state prison systems).

[69] See, for example, Vandenbraak, *supra* note 65, for a critique of how judicial orders stunted her office's ability to prosecute cases. Ms. Vandenbraak, then Assistant District Attorney in Philadelphia, Pennsylvania, drafted the portion of the PLRA about limiting prospective relief, in response to her office's frustration in its inability to detain certain classes of misdemeanants pre-trial. Interview with John Boston, Director, Prisoners' Rights Project, New York City Legal Aid Soc'y (Sept. 14, 2007); *see also* Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329 (1997) (surveying the National Association of Attorney Generals' campaign to publish provocative lists of "Top Ten" Frivolous Lawsuits).

[70] In 1996, Congress passed three laws that limited federal court jurisdiction over issues of disenfranchised populations: the Antiterrorism and Effective Death Penalty Act, the Illegal Immigration Reform and Immigrant Responsibility Act, and the PLRA. Ronald Weich, *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis*, ACLU Dept. of Public Education (October 2001), *available at* http://www.aclu.org/FilesPDFs/ACF1B88.pdf; Schlanger, *Inmate Litigation*, *supra* note 44, at 1566 n.27 (describing the merger of tort reform and anti-judicial activism behind many legislative proposals of the 104th Congress's Contract with America).

prisoner litigation at the individual[71] and institutional level.[72] The Act limited the equitable power of federal courts through burden-heightening. Federal judges may not grant any prospective relief unless plaintiffs can establish that defendants have committed constitutional violations.[73] Section 3626(a)(1)(A) of Title 18 of the United States Code also sets forth a "need-narrowness-intrusiveness" standard that limits federal judges to awarding "relief [that] is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[74]

Litigation on the merits[75] had always been restricted by this need-narrowness-intrusiveness standard.[76] Section 3626(c)(1) now mandates that consent decrees also comply with the need-narrowness-intrusiveness standard.[77] For a federal court to maintain jurisdiction

[71] For specific modifications to the U.S. Code, see *supra* note 23. The Act explicitly intended to reduce the number of complaints reaching federal court. Whether frivolous or not, prisoner complaints have dropped drastically. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 3-4 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf (concluding that enactment of the PLRA caused "the rate at which State and Federal prison inmates filed civil rights petitions and the number of civil rights petitions [to] decrease[] dramatically").

[72] 18 U.S.C. § 3626 (2006).

[73] This Note analyzes this section of the PLRA, entitled "Appropriate remedies with respect to prison conditions." *Id*.

[74] The remedies available in federal court—injunctions, damages, and attorneys fees—have not changed. However, the *scope* of remedies is significantly constricted. Even with a need-narrowness-intrusiveness finding, prospective relief is limited to two years after the relief was granted, one year after a request for termination was denied, or two years after the enactment of the PLRA. *See* 18 U.S.C. § 3626(b)(1)(A)(i), (ii), and (iii), respectively. Section 3626(b) also establishes the timelines and procedures for terminating previously granted prospective relief that had not and did not meet the need-narrowness-intrusiveness test of § 3626(a).

[75] *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining judgment "on the merits" as "delivered after the court has heard and evaluated the evidence and the parties' substantive arguments"). This Note considers "litigation on the merits" as a case that proceeds to a jury or bench trial and final decision. The proceedings that lead up to settlements, consent decrees, and litigation on the merits all include discovery and motion practice. However, settlements and consent decrees are voluntarily dismissed before a final judgment is rendered. Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WISC. L. REV. 1275, 1276 ("In the context of prison condition cases, consent decrees are a form of settlement in which the defendants, without admitting to any wrongdoing, agree to correct allegedly unconstitutional conditions in exchange for which the plaintiffs agree to discontinue a pending lawsuit."); *see, e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 215-16 (S.D.N.Y. 2006) (settling New York City jail conditions suit after four years of extensive pre-trial practice).

[76] John Boston, The Prison Litigation Reform Act 10 n.38 (Mar. 1, 2007) (unpublished manuscript, on file with author) (reviewing cases that find that § 3626(a)(1)(A) codified existing laws about civil rights injunctions); *see also* FED. R. CIV. P. 65(d) (limiting the contents and scope of injunctions and restraining orders).

[77] *See* Ruiz v. Estelle, 161 F.3d 814, 825 (5th Cir. 1998) ("[T]he PLRA *does expressly* restrict the prospective relief which may be afforded by a consent decree to the same extent and in the same manner as it restricts the prospective relief which may be afforded by a judgment entered

over a case, a judge can no longer simply bypass the question of a constitutional violation and endorse the forms of relief that the parties propose. Every civil action requires a detailed court finding or is subject to dismissal.[78]

2. Private Settlement Agreements as a Means of Avoiding PLRA Limitations on Remedies

Section 3626(c)(2) of the Act presents the "private settlement agreement" as an alternative to the restrictions on consent decrees. The Act explains that it does not preempt state law remedies and that the bar on broad judicial enforcement is intended only for federal courts.[79] The availability of state court remedies buttresses Congress's drastic reduction of broad federal court enforcement.[80]

Private settlement agreements benefit both parties: defendants avoid the court finding they have committed constitutional violations[81] and plaintiffs achieve broader prospective relief.[82] Once the parties agree to the terms of a private settlement agreement, the federal judge dismisses the case.[83] Breaches will not be resolved in federal court.

pursuant to adversarial litigation without agreement.").

[78] 18 U.S.C. § 3626(b)(2) (2006).

[79] 18 U.S.C. § 3626(d) (2006) ("The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law."). While Congress cannot make rules of decision about state claims, the broad language of § 3626(a)(1), stating "in *any* civil action" could be interpreted to apply to state actions (emphasis added). Thus, subsequent judicial decisions have clarified that § 3626(d) is inapplicable to state law. *See, e.g.*, Handberry v. Thompson, 436 F.3d 52, 62-63 (2d Cir. 2006).

Congress only has the authority to preempt—strip state court jurisdiction for claims—if it designates federal courts to hear the claims instead. *See, e.g.*, Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1) (2006) (granting "exclusive jurisdiction" to district courts to resolve claims against the United States); *see also* Tafflin v. Levitt, 493 U.S. 455, 458-60 (1990) (holding that the Supremacy Clause allows Congress to limit enforcement of federal rights to federal court).

[80] *Cf.* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983) ("The statute may reflect a compromise between those who wanted it to be fully effective in achieving its stated objective and those who wanted a less effective statute; if so, it should be enforced according to that compromise.").

[81] *See, e.g.*, Gaddis v. Campbell, 301 F. Supp. 2d 1310, 1322 (M.D. Ala. 2004) ("The Plaintiffs and Defendant expressly acknowledge and agree that this Settlement Agreement does not constitute an admission of liability by the Defendant or the ADOC.").

[82] Plaintiffs are not limited in relief so long as the private settlement agreement terminates federal court jurisdiction. 18 U.S.C. § 3626(c)(2) (2006), entitled "[p]rivate settlement agreements," provides:

> (A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

[83] Litigants will typically move for the court to dismiss the complaint and proceedings once they have drafted a settlement. *See, e.g.*, Bowers v. Philadelphia, No. 06-CV-3229, 2007 WL

The settlement agreements are intended to be enforced as contracts in state court.[84] If parties want a federal judge to enforce the agreement, the parties can only reenter the original proceedings. Back in federal court, the plaintiffs must prove ongoing constitutional violations and the court can only design remedies consistent with the need-narrowness-intrusiveness standard.[85]

While the private settlement agreement with dismissal of the underlying federal claim had always been available to litigants, litigants probably never used this procedure in the way prescribed by the PLRA.[86] By contrast, consent decrees to remedy constitutional

2972556 (E.D. Pa. Oct. 10, 2007). In *Bowers*, the plaintiffs filed a complaint in July 2006, alleging Eighth Amendment violations in the Philadelphia prisons; the court certified a class in September, and held an evidentiary hearing from October 3 to October 6. The court ordered a preliminary injunction in January 2007, and the terms were extended in 90-day periods through October 2007. Despite consistently denying the basis for an injunction or monitoring of conditions, the defendants eventually agreed with the plaintiffs to settle the agreement for terms that were "essentially coextensive with that which would be achieved if Plaintiffs were to prevail at a hearing on a contested motion to extend the current injunction." *Id*. at *4 (quoting the settlement agreement).

84 *See, e.g.*, *infra* note 101 and cases cited therein.

85 18 U.S.C. § 3626(g)(6) (2006) (defining "private settlement agreement" as "an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled"). The significance of allowing the parties to return to federal court is unclear. Interview with John Boston, Director, Prisoners' Rights Project, New York City Legal Aid Soc'y (June 24, 2008). Since discovery would be stale after time passed for settlement, breach, and reinstatement, parties would invariably proceed as if they had never settled. Because time limitations typically do not apply to equitable relief, this provision does not benefit plaintiffs for tolling purposes. Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) ("Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.").

86 A brief debate on the House floor about an amendment to cut the limitations on attorneys' fees for private settlement agreements reveals that the language about private settlement agreements did not arise from any previous experience settling claims in that manner. 141 CONG. REC. H1472-06 (daily ed. Feb. 9, 1995) (statement of Rep. Watt) ("I guess the concern I have is I am not aware of any prison litigation which is taking place which has been settled without either court approval or court involvement of some kind. These cases simply do not resolve themselves in the way that an automobile accident resolves itself. In fact, every prison litigation involves a public issue which typically is brought as a class action and under the rules of civil procedure cannot be settled without court involvement . . . . Can the gentleman cite one case that he is aware of, a prison litigation case or a prison condition case where the case has been resolved by private settlement?"); *see also* Resnik, *supra* note 58, at 46 (finding that federal court statistical data did not reflect how many notices of dismissal resulted from consent).

For example, even litigation terminated after a judicially approved mediated settlement agreement did not qualify as a "private settlement agreement" under the PLRA. *See* Jones v. Mabry, 205 F.3d 1346, 1999 WL 1204569, at *1 (8th Cir. Dec. 6, 1999). The Arkansas Department of Corrections had settled a class action suit in 1979 agreeing that no standard hair length or style would be required. In 1998, the Department adopted a grooming policy and class members sued for breach. In *Jones*, the Court held that the prisoners' agreement with the Department was not a private settlement agreement and terminated the agreement pursuant to the Act's termination provisions. *Id*. The court could have simply denied jurisdiction to hear the complaint and directed the plaintiffs to state court. *See, e.g.*, Shaffer v. Veneman, 325 F.3d 370, 373 (D.C. Cir. 2003) (refusing to re-assert jurisdiction over "any express or implied contract with the United States" that, under the terms of the Tucker Act, reserved exclusive jurisdiction to the

violations and inhumane conditions had dominated the prison landscape since the 1970's.[87] Before the PLRA, institutional reform litigation either went the path of litigation or agreement, with the underlying claims remaining in federal court.[88] The PLRA now distinguishes between ongoing federal court involvement by way of litigation *or* consent, on the one hand, and settlements that dismiss the underlying claim, on the other hand.[89]

Where the Act makes resolution by consent decree closely analogous to litigation on the merits, litigants must decide if they can obtain adequate and timely relief in federal court. To get the relief they seek, and reduce immediate risks and costs, plaintiffs might often choose the private settlement agreement.

3. Congress's Failure to Debate the Act's Provisions Limiting Prospective Relief

The scant legislative history of the PLRA indicates that Congress agreed about the provisions to reduce non-meritorious suits, which were overwhelming the federal docket.[90] By contrast, various members opposed the provision that would limit the remedial powers of federal judges.[91] Members of Congress opposing this section argued that

Court of Federal Claims).

[87] *See supra* notes 48-58.

[88] *See supra* notes 58-64 and accompanying text (describing the benefits of settling through consent decrees before the PLRA).

[89] *See supra* notes 77-85 and accompanying text.

[90] Complaints about prisoner suits dominated Congress's limited debate over the PLRA. *See, e.g.*, 141 CONG. REC. S14408-01 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (quoting a letter sent to him by the National Association of Attorney Generals) ("Although occasional meritorious claims absorb state resources, nonetheless, we believe the vast majority of the $81.3 million [spent on inmate civil rights suits] is attributable to the non-meritorious cases."); S14408-01 (statement of Sen. Hatch) ("Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation."); S14408-01 (statement of Sen. Kyl) ("These prisoners are victimizing society twice-first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar."); *see also* Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 367 (1998) (surveying "frequent filers" of frivolous claims, including: Lonzy Oliver (fifty one suits in thirteen years); John Robert Demos (184 suits in three years); and "Reverend" Clovis Carl Green, Jr. (over 700 lawsuits)). *But see* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996) (finding that the notoriously frivolous chunky peanut butter complaint involved a prisoner objecting to being charged for an item that he had not received).

[91] *See, e.g.*, 142 CONG. REC. S2289-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) (reading a letter from five U.S. Senators to Attorney General Janet Reno cautioning against restricting federal court jurisdiction):

> We do not take issue with provisions in the PLRA that merely seek to curb frivolous prison litigation. But in other respects, the PLRA is far reaching legislation that would

federal courts would be more—not less—burdened by the Act because parties would be forced into litigating complaints that had previously been resolved by agreements.[92] The limited debate did not recognize that litigants would choose the route of private settlement agreements or address the feasibility of state courts asserting subject-matter or remedial jurisdiction over private settlement agreements.[93] In fact, prisoner complaints in state court, whether based on contract or other theories, had rarely been utilized by practitioners.[94] In addition, because

unwisely reduce the power of the federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities.

[92] For example, in a typical exchange between opponents and supporters of the bill, serious issues with the repercussions of the limitations on prospective relief on the federal docket were raised and disregarded. 141 CONG. REC. S14611-01 (daily ed. Sept. 29,1995):

> [Sen.] Biden: [I]n an effort to relieve the courts and State and local governments from the overwhelming task of dealing with frivolous lawsuits, [this] amendment . . . creates restrictions on the power of those governments from voluntarily negotiating their own agreements and would place an even greater burden on the courts to litigate and relitigate [sic] these suits. . . .
>
> . . . .
>
> [Sen.] Hatch: If my colleagues would forgo so we can pass this—we are all interested in passing it and establishing once and for all that we have to get rid of frivolous prisoner litigation. . . .
>
> . . . .
>
> [Sen.] Kyl. [recites Top Ten Frivolous Suits].

See also 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) (quoting the July 27, 1995 testimony of Associate Attorney General John R. Schmidt, in which he stated that provisions limiting the power of federal courts to issue relief in prison conditions cases would "create a very substantial impediment to the settlement of prison conditions suits—even if all interested parties are fully satisfied with the proposed resolution. This would result in litigation that no one wants . . . and could require judicial resolution of matters that would otherwise be more promptly resolved by the parties in a mutually agreeable manner.").

The PLRA was criticized for rushing major changes through Congress by attaching the Act as a rider to an Omnibus Appropriations Act and offering minimal information on legislative intent beyond unconcealed rhetoric. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Prison Reform Litigation Act of 1995, Pub. L. No. 104-134, tit. VII, 110 Stat. 1321 (1996). *See, e.g.*, 141 CONG. REC. H14078-02 (daily ed. Dec. 6, 1995) (statement of Rep. Conyers) ("None of these provisions belong in an appropriations bill. These are matters clearly within the jurisdiction of the Judiciary Committee and I am distressed that the Judiciary Committee's jurisdiction has been subverted in this way."); Geoffrey Christopher Rapp, Case Note, *Low Riding*, 110 YALE L.J. 1089 (2001) (arguing that it is impossible to understand Congressional intent for the PLRA because it is a substantive piece of legislation enacted under an appropriations rider).

[93] Considering that state court jurisdiction appeared in two parts of § 3626—with respect to settlements only being enforceable in state courts and then that the limitations on relief were not applicable to state courts—this Note argues that the legislators who negotiated this provision anticipated the availability of state court alternatives. Thus, arguments exposing troubles with state court availability might have prevented a passage of this part of the Act. Unfortunately, the legislative history suggests that this section of the PLRA was not fully briefed or contested because opponents of the Act hoped that President Clinton would veto the bill as he had before. *See* 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("President Clinton vetoed this appropriations bill on December 18, but it is our understanding that issues such as the PLRA may be the subject of negotiations between the Administration and members of the Appropriations Committees in the coming weeks.").

[94] *See supra* note 44 (setting forth case examples).

prison reform cases have been concentrated in federal court, little scholarly attention has been paid to state laws that address or substantially affect prisoner litigation.[95]

C. *Judicial Response to PLRA*

Despite explicit statutory instructions that institutional reform litigation settled in federal court is only enforceable in state court, litigants have not yet brought these cases in state court. Some federal courts of appeals, however, have analyzed the settlement provisions in relation to challenges to the PLRA provision terminating long standing consent decrees.[96] To remove federal courts from state prison management, the Act provided for "immediate termination of any prospective relief" if the original decision did not make a need-narrowness-intrusiveness finding.[97] When the defendant institutions moved for termination, plaintiffs argued that the consent decrees should not be terminated because they included underlying contract rights still

[95] *See generally* James K. Robinson, *Preface to Thirtieth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals, 1999-2000*, 89 GEO. L.J. 1045, 1897 (2001) (reviewing a significant body of federal decisions affecting prisoners' rights). *But see* Schlanger, *Inmate Litigation*, *supra* note 44, at 1635 n.272 (2003) (listing states that have enacted statutes similar to the PLRA as of 2003); *see also* Richard D. Vogel, *Silencing the Cells: Mass Incarceration and Legal Repression in U.S. Prisons*, MONTHLY REVIEW, May 2004, *available at* http://www.monthlyreview.org/0504vogel.htm ("When Attorney General John Ashcroft was a U.S. senator [sic], he advocated that other state and local institutions adopt the premises and procedures of this law.").

[96] Institutional defendants moved for and were granted termination in each Circuit. *See, e.g.*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) (rejecting separation of powers, due process, and equal protection challenges to 18 U.S.C. § 3626); *see also* Gilmore v. California, 220 F.3d 987 (9th Cir. 2000); Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144, 161-62 (2d Cir. 1999) (en banc); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940, 942 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 657 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081, 1088-89 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365, 371-73 (4th Cir. 1996). Supreme Court certiorari was denied in most of these cases.

"Private settlement agreements" have also been disputed in relation to the applicability of "prevailing party" attorneys fees, but this inquiry does not inform an analysis of justiciability or redressability in state court. *See* 42 U.S.C. § 1997e(d) (2006) (limiting plaintiff's counsel's rate to 150% of the rate paid in each federal district court to court-appointed counsel); *see, e.g.*, Torres v. Walker, 356 F.3d 238, 244 (2d Cir. 2004) ("[W]e conclude that the 'so-ordered' stipulation of dismissal in this case does not carry with it a 'sufficient judicial imprimatur' to warrant treatment as a monetary judgment for the purposes of the PLRA.").

[97] 18 U.S.C. § 3626(b)(2) (2006). Once effective in April 1996, the Act enabled state, city, and municipal officials to petition federal courts to terminate the decrees. Terminations then occurred swiftly. For example, New York City Department of Correction officials moved for termination of the *Benjamin* consent decrees that managed New York City jails, the attorneys submitted motions and responses and argued vis-à-vis the constitutionality of the termination provision, and the District Judge vacated the consent decrees by July 3, 1996. Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996) (Baer, J.).

subject to state enforcement.[98] No court accepted this position.[99] These courts neither analyzed state law nor sent the question of the survival of contractual rights to the state's highest court for review.[100] In justifying termination of longstanding decrees, the Courts distinguished consent decrees, conditioned on ongoing court supervision and approval, from settlement agreements, which they found were intended to create contractual rights.[101]

II. PROGRESSION FROM FEDERAL TO STATE COURT

A. *Creation of Private Settlement Agreements in Federal Court*

[98] Whether the consent decrees include enforceable contract claims actionable in state court is inapposite to the question of whether settlement agreements are contracts. The Act clearly guides litigants to create private settlement agreements in which the breach may be enforced in state court by "any remedy available under State law." *See* 18 U.S.C. § 3626(c)(2)(B) (2006).

[99] *See Imprisoned Citizens Union*, 169 F.3d at 190 (Alito, J.) ("If the Inmates have valid contractual claims that survive termination, such claims are 'based solely upon . . . [Pennsylvania] law,' and are not affected by the PLRA. . . . The Inmates are therefore free to pursue relief in the Pennsylvania courts.") (citation omitted); Hazen *ex rel*. LeGear v. Reagen, 208 F.3d 697 (8th Cir. 2000) (terminating decrees despite plaintiff's argument that the decrees are enforceable in state court as private contracts).

[100] *See, e.g.*, ITC Ltd. v. Punchgini, Inc., 880 N.E.2d 852 (N.Y. 2007) (accepting two questions certified by the Second Circuit, pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, concerning New York common law claims).

This disregard of applicable state law in the context of prison litigation is unusual because parties have briefed, District Courts have addressed and the U.S. Supreme Court has reviewed the ability of state courts to handle prisoner law suits in the context of tort and constitutional claims. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984) (holding that an intentional deprivation of property does not give rise to a violation of the Due Process Clause if the state provides an adequate post deprivation remedy); Bivens v. Six Unknown Named Federal Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (finding that a State tort remedy did not provide an adequate and exclusive remedy because State laws might not relieve constitutional violations).

[101] When the City of New York moved to terminate the longstanding *Benjamin* consent decrees that monitored the jails, the Second Circuit judges debated the availability of contract claims. The litigants' ability to contract and enforce the breach in state court was woven into the judges' interpretation of the validity of the limitations on prospective relief. Judge Calabresi affirmed the termination provisions as a limit on federal jurisdiction but held that the decrees could still be enforceable in state court. Benjamin v. Jacobson, 124 F.3d 162, 170 (2d Cir. 1997).

En banc, Calabresi's position was abandoned. Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999), Judge Kearse found that the PLRA destroyed the rights established by consent decree, reasoning that Congress intended to leave plaintiffs with some rights by affording them the option of creating fully vested settlement agreements. *Id.* at 156 (Kearse, J.) ("We think it clear from the statutory terms distinguishing between consent decrees and private settlement agreements that Congress intended to free governments from judicial constraints not based on need-narrowness-intrusiveness findings, but not to relieve them of their private contractual obligations-however broad-that are not judicially ordered."). Judge Calabresi maintained his original position. *Id*. at 184 (Calabresi, J., concurring in result) (reasoning that many underlying agreements would be actionable as contract claims in state court despite the termination of the full consent decrees in federal court).

Despite the PLRA limitations on remedies, plaintiffs continue to file actions in federal court. Litigants then voluntarily dismiss many of these actions through private settlement agreements.[102] The agreements contain a range of context-specific provisions that are not subject to the need-narrowness-intrusiveness limitations on prospective relief.[103] The specificity and monitoring provisions of these post-PLRA private settlement agreements closely resemble consent decrees created before the PLRA.[104] The persistence of such detailed settlements strongly suggests that plaintiffs will seek specific performance[105] when their agreements are breached. It also shows that litigants value expansive and quick remedial action over the enforceability of such arrangements.

For example, in 1998, in *Austin v. Hopper*, inmates working on a prison chain gang filed a class action suit in federal district court asserting that the Alabama Department of Corrections' (ADOC) failure

[102] *See, e.g.*, Bowers v. City Of Philadelphia, No. 06-CV-3229, 2007 WL 2972556, at *4 (E.D. Pa. Oct. 10, 2007) (agreeing to terminate the federal court-ordered preliminary injunctive relief in exchange for a private settlement agreement pursuant to § 3626(c)(2) whereby "the plaintiffs will ultimately be entitled to relief in a [state] court"); Ingles v. Toro, 438 F. Supp. 2d 203, 215 (S.D.N.Y. 2006) (approving private settlement agreement but expressing concern that after "countless hours" spent discussing the substantive terms of the agreement and its language, going to state court to seek relief from a new judge "would be a tremendous waste of resources"); Lozeau v. Lake County, Mont., 98 F. Supp. 2d 1157 (D.Mont. 2000) (approving a private settlement agreement according to § 3626(c)(2)).

[103] See, for example, Gaddis v. Campbell, 301 F. Supp. 2d 1310 (M.D. Ala. 2004), discussed *infra* at notes 108-9. In *Gaddis*, the district judge cited, but did not investigate, the Act's provision moving jurisdiction to state court. *Id*. at 1314. The settlement agreement also acknowledges that " [i]n the event of non-compliance with any of the terms in this Settlement Agreement, the plaintiffs may only enforce the Settlement Agreement in state court, pursuant to 18 U.S.C. § 3626(c)(2)(B)." *Id*. at 1322; *see also* 18 U.S.C. § 3626(c)(2)(A) (2006) (permitting parties to enter into agreements that do not comply with the need-narrowness-intrusiveness standard of subsection (a)). Basic damages actions also remain available to litigants and need not comply with a need-narrowness-intrusiveness standard. *See* 18 U.S.C. § 3626(g)(7) (2006) ("[T]he term 'prospective relief' means all relief other than compensatory monetary damages.").

[104] *See, e.g.*, D.M. v. Terhune, 67 F. Supp. 2d 401, 403-05 (D.N.J. 1999) (approving private settlement agreement concerning mental health treatment that includes amending Department of Corrections disciplinary regulations, policies and procedures, creating a mental health treatment plan, and funding, monitoring, and enforcing the settlement); *In re* Texas Prison Litig., 191 F.R.D. 164 (W.D. Mo. 1999) (approving private settlement agreement for a class action suit by Missouri prisoners in a Texas Cell Lease Program whereby Missouri agreed not to transfer its inmates to any other state, subject to limited exceptions).

Institutional defendants also benefit because they can terminate disputes without admitting to, or having the court find, a constitutional violation. *Compare* Private Settlement Agreement Between Defendants and Plaintiffs, ¶ 4, Mast v. Donahue, No. 2:05-cv-00037 (S.D. Ind. Jan. 23, 2007) [hereinafter *Mast v. Donahue Settlement Agreement*], *available at* http://www.aclu.org/images/asset_upload_file99_28160.pdf ("The defendants deny any and all allegations made by the plaintiffs in this cause [sic], but believe it is in the best interests of the citizens of the State of Indiana to enter into this Private Settlement Agreement."), *with* Lancaster v. Tilton, No. C 79-01630, 2006 WL 2850015, at *13-14 (N.D. Cal. Oct. 4, 2006) (refusing to approve a modified settlement in the absence of evidence of an ongoing violation).

[105] Specific performance of a contract awards the promisee his expectation interest, putting him in as good a position as if the contract had been performed. EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 1.1, at 4 (1989).

to provide private toilet facilities violated their First, Fifth, Eighth, and Fourteenth Amendment rights.[106] A federal district judge approved a settlement agreement to remedy the problem, in which ADOC agreed to create and implement a standard operating procedure and then allow random monitoring for eight months.[107] In 2004, in *Gaddis v. Campbell*, diabetic inmates in the Alabama prison system filed a class action lawsuit in federal district court alleging that ADOC's failure to provide adequate medical care violated their constitutional rights.[108] The federal district judge approved a lengthy settlement agreement establishing diabetes policies and procedures, including provisions for intake screenings, ongoing blood sugar testing and control, eye exams, foot exams, testing and treatment for kidney and heart disease, dental care, diet, exercise, and educational standards.[109] Both of these agreements were created according to the commands of Section 3626(c), and, after the parties negotiated, the underlying complaints were dismissed from federal court without prejudice.[110]

While private settlement agreements are steadily increasing in prison conditions suits, claims for enforcement are not appearing in state courts.[111] Accounting for any procedural delay after the passage of

106 28 F. Supp. 2d 1231 (M.D. Ala. 1998).

107 *Id*. at 1234 ("This standard operating procedure would include the following provisions: soap, water, and toilet paper will be provided to all inmates; there will be one portable toilet for every squad of 40 inmates; the portable toilet will be equipped with a heavyweight canvas screen; for medium custody inmates who labor on prison grounds (as opposed to those inmates who labor on public highways), and for whom no toilet facilities are available, reasonable efforts will be made to allow privacy for those who need to relieve themselves; and a shovel or other instrument will be provided to such medium security inmates for the purpose of digging a hole when an inmate must defecate and no toilet facility is available.") (quoting the parties' settlement agreement).

108 301 F. Supp. 2d 1310, 1314 (M.D. Ala. 2004).

109 *Id*. at 1317-22. The Southern Poverty Law Center based the *Gaddis v. Campbell* litigation on the American Diabetes' Association's 2003 recommendation for diabetes management in prisons. *Gaddis* represents the most comprehensive diabetes treatment in any prison system in the United States, a major accomplishment given the obstacles the correctional setting raises for effective treatment. *See* Linda L. Edwards, *Managing Diabetes in Correctional Facilities*, 18 DIABETES SPECTRUM 146 (2005), *available at* http://spectrum.diabetesjournals.org/cgi/content/full/18/3/146 (discussing prison culture, budget constraints, retention of nursing staff, canteen purchases, lock-downs, and transfers as some of the obstacles to effective diabetes care in prisons).

110 Austin v. Hopper, 28 F. Supp. 2d at 1239; Gaddis v. Campbell, 301 F. Supp. 2d at 1322. The District Court judge cited the § 3626(c)(2)(B) language setting forth the parties' agreement to resolve any breaches in state court without addressing the plausibility of actually pursuing this state court breach of contract claim. *Id.* at 1314.

111 For example, various searches on Westlaw in all fifty state court systems on December 25, 2007 revealed no cases that matched permutations of the terms "PLRA" and "3626(c)(2)"—the private settlement provision—or "PLRA" and "private settlement agreement." In addition, among the national network of prison reform lawyers, none had yet utilized state courts to enforce settlement agreements. Interviews with John Boston, Director, Prisoners' Rights Project, New York City Legal Aid Soc'y (Sept. 14, 2007 & June 24, 2008). *But see* Christopher E. Smith & Christopher E. Nelson, *Perceptions of the Consequences of the Prison Litigation Reform Act: A*

the PLRA,[112] and proceeding with the simple assumption that the settlements are being breached,[113] this dearth of enforcement suits is significant. Deferring enforcement may be strategic.[114] This Note argues, however, that this delay also reflects a tacit acknowledgement by litigants that resorting to state court will not provide the necessary remedy.[115]

Comparison of State Attorneys General and Federal District Judges, 23 JUST. SYS. J. 295, 309 (2002) (surveying state attorney generals and finding that prisoner litigation increased in state court as a result of the federal PLRA); Schlanger, *Inmate Litigation*, *supra* note 44, at 1636 n.273 (same). However, given that information on these cases is absent from legal databases, it appears that most of the cases have been summarily dismissed. There is no indication that any major institutional reform litigation has been brought in state court.

Yet, at least one post-PLRA private settlement agreement was reinstated in federal court upon breach, after which the court found ongoing constitutional violations and the parties entered into a consent decree within need-narrowness-intrusiveness standards. Ginest v. Bd. of County Comm'rs. of Carbon County, 333 F. Supp. 2d 1190 (D. Wyo. 2004). In addition, despite endorsing a private settlement agreement with explicit dismissal from federal court, litigants on both sides of another suit returned to federal court but the court denied jurisdiction. York v. County of El Dorado, 119 F. Supp. 2d 1106, 1109 (E.D. Cal. 2000).

112 There is a necessary delay between filing of a federal suit, negotiating a settlement in federal court, and then dismissing the underlying suit. *See, e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 206 (S.D.N.Y. 2006) (approving private settlement agreement for class action concerning use of excessive force in New York City jails after "four years of hard-fought litigation, including extensive discovery, motion practice, and settlement negotiations").

113 Given the federal court's experience with necessitating judicial tools to enforce agreements, there is no reason to assume that institutional defendants now fully comply with the terms of their agreements. *See, e.g.*, Baer & Bepko, *supra* note 46, at 25 (quoting Judge Lasker, the first federal judge to oversee New York City's *Benjamin* consent decrees, as warning: "Defendants have been subject to court orders for many years, and all of the parties to this lawsuit know through frustrating experience that the entry of an order does not guarantee its timely observance.").

114 *See, e.g.*, Interview with Rhonda Brownstein, Esq., Southern Poverty Law Center (Nov. 9, 2007). When asked if the Alabama prison system had complied with *Gaddis v. Campbell*, a "private settlement agreement" she helped facilitate post-PLRA, Ms. Brownstein stated: "These things are never exactly perfect but have raised the bar significantly." Ms. Brownstein stated that although the defendants were not in complete compliance, the plaintiffs had not yet sought to enforce the breach. This delay suggests that immediate changes to make ADOC offer sufficient treatment to all diabetic inmates was more important than achieving an agreement that was subject to court enforcement. Such immediate changes require agreement between the parties instead of adversarial litigation, explaining why the parties selected a private settlement agreement. For details about the *Gaddis* settlement, see *infra* notes 108-109 and accompanying text.

Settlement agreements are also more difficult to monitor because attorneys are not guaranteed access to prison and jail facilities. Interview with Rhonda Brownstein, Esq., Southern Poverty Law Center (Nov. 9, 2007). After negotiating a settlement agreement, attorneys rely on individual inmates to contact them with problems. Attorneys are then burdened to respond and investigate if the defendants are in breach. *Id.* In addition, lack of face-to-face contact is problematic considering the educational level of many inmates. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., LITERACY BEHIND PRISON WALLS (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf (explaining lower literacy rates in the prisoner population by the concentration of ethnic and racial minorities with comparatively lower levels of education than the household population).

115 Fear of the bias or prejudice of local judges against prison litigants still informs the choices of litigants in bringing suits and enforcing breaches. *See supra* note 43 (reasoning why

B. *Barriers to State Enforcement*

The tentative language of the Act does not promise litigants that they will be able to achieve the same enforcement in state court as they could under the pre-PLRA consent decree regime in federal court. Yet, federal judges have converted the Act's suggestion of state court relief into an interpretation that the contracts will be enforced in state court.[116] Where an agreement comports with all basic principles of contract law,[117] courts should resolve any breaches using tools they typically use to bring parties into compliance, including sanctions, contempt, and monitors.[118] This Note examines some of the potential barriers to enforcing these contracts, including immunity law, bars on specific performance, and additional limitations arising from state PLRA analogs and concludes that, in many cases, resort to state court systems portends innumerable complications in enforcement.[119]

The thirty-two-paragraph settlement agreement from *Gaddis v. Campbell*,[120] a suit by diabetic inmates in the Alabama Department of Corrections, serves as a model to highlight the potential barriers that litigants will face when bringing contract claims against prison administrations in state court.[121] This analysis illustrates potential

marginalized groups might prefer federal judges). It is unclear, however, whether litigants are aware of substantive reasons why state courts might not provide the necessary remedies. This Note urges litigants to explore and develop a record of constitutional, statutory, and common law obstacles in state court that can later be used to challenge the PLRA's provision limiting prospective relief in federal courts.

116 *See, e.g.*, Shultz v. Wells, 73 Fed. App'x 794, 796 (6th Cir. 2003) (reversing a District Court's termination of an agreement between an asthmatic prisoner and a correctional facility not to house him with any smokers, the Sixth Circuit held that "the [PLRA] specifically provides that private settlement agreements are enforceable 'in State court.' 18 U.S.C. § 3626(c)(2)(B)"); Benjamin v. Jacobson, 172 F.3d 144, 158 (2d Cir. 1999) (en banc) ("We note also that the Act, in contrasting the treatment to be given to private settlement agreements, specifies that those agreements are enforceable 'in State court.'").

117 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 12 (1978) (capacity to contract); § 18 (manifestation of mutual assent), § 71 (requirement of exchange), §74 (settlement of claims) and §94 (stipulations). Because contract law is state-based and varies by state, this Note will refer to basic principles set forth in the Restatement Second of Contracts. This Note assumes that the settlement agreements at issue satisfy general contracting standards, including offer and acceptance, as well as consideration, and are free from the Statute of Frauds, fraud, duress, or unconscionability issues.

118 *See supra* note 62.

119 In fact, this difficulty in enforcement best explains why parties entered into consent decrees in institutional reform litigation in the first place. *See* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20 (arguing that settling parties enter into consent decrees to "speed up the process of construing and enforcing" contracts that are "executory, novel [and] complex").

120 301 F. Supp. 2d 1310 (M.D. Ala. 2004). For details about the *Gaddis* settlement, see *supra* notes 108-109 and accompanying text.

121 This analysis demonstrates that litigants will have to overcome numerous technical issues

arguments against jurisdiction, concluding that litigants will have to bring these claims in state court to understand exactly how state law will interact with prison conditions settlement agreements.

1. Immunity

Suits against a state agency, state actor, or the state itself will likely be limited by state immunity restrictions.[122] Immunity from suit depends on the parties being sued and the type of relief sought.[123] Unlike private contracts between private actors, institutional reform agreements develop from suits against government employees charged in their personal or official capacities.[124] While capacity suits are unproblematic in the context of federal constitutional litigation, courts have not yet been asked how capacity suits will translate into contract

before reaching the merits of the case. Another major provision of the PLRA, 42 U.S.C. § 1997(e)(a), which requires prisoners to exhaust administrative remedies before suing in federal court, has also generated increased litigation on technical issues, with little resolve on the merits. The United States Supreme Court has already addressed the parameters of the exhaustion requirement in the PLRA three times since the passage of the Act in 1995. *See* Jones v. Bock, 549 U.S. 199 (2007); Porter v. Nussle, 534 U.S. 516 (2002); Booth v. Churner, 532 U.S. 731 (2001).

122 *See, e.g.*, Angelle v. State, 34 So. 2d 321, 323 (La. 1948) ("The principle that the sovereign cannot be sued in its own courts without the consent of the Legislature is so fundamental that citation of authority would be superfluous."); Arkansas Pub. Defender Comm'n. v. Greene County Cir. Ct., 32 S.W.3d 470, 473 (Ark. 2000) (finding that sovereign immunity from express state constitutional declaration is jurisdictional immunity from suit).

123 *See, e.g.*, Phillips v. Thomas, 555 So.2d 81, 83 (Ala. 1989) ("In determining whether an action against a state officer or employee is, in fact, one against the State, this Court will consider such factors as the nature of the action and the relief sought."). Thus, the immunity inquiry is closely tied to the requested remedy, as discussed in Part II.B.2 *infra*.

124 In suits against persons in their official capacity, government employees might be required to execute an agreement even if they were not parties to the contract. In these cases, parties signing the contract are typically acting for third parties. For example, in the Indiana settlement agreement (*Mast v. Donahue*) challenging the conditions of isolation for mentally ill prisoners in Indiana's supermaximum security units, two American Civil Liberties Union attorneys signed on behalf of the plaintiff class, and the Commissioner for the Indiana Department of Correction and the Deputy Attorney General of Indiana signed for the defendants. *Mast v. Donahue Settlement Agreement*, *supra* note 104 The parties eventually created a settlement agreement that instructed the Indiana Department of Corrections to identify inmates with serious mental illness and divert them from the SHU, monitor the SHU population to see if conditions caused other prisoners' mental health to decompensate, and report back to the plaintiff's attorneys for two years. *Id*.

In institutional prison reform litigation, corrections officials at various levels of the systems' hierarchy are typically sued. *See, e.g.*, Gaddis v. Campbell, 301 F. Supp. 2d 1310, 1311 (M.D. Ala. 2004) (settling class action prison conditions case with the counsel for the Department of Corrections, an executive office); *In re* Texas Prison Litigation, 191 F.R.D. 164 (W.D. Mo. 1999) (suing two Texas counties, two private prison companies, a private prison transportation company and officers, corporals, nurses, and directors of the Missouri Department of Corrections); D.M. v. Terhune, 67 F. Supp. 2d 401 (D.N.J. 1999) (suing state correctional officials).

law.[125] To remedy a breach, parties may seek either damages,[126] or equitable relief.[127] While prisoner litigants ask for both forms of relief,[128] this Note addresses the PLRA provision that limits prospective relief, the detailed affirmative actions or injunctions that prisoners demand. This combination of parties and remedies does not typically emerge in contract law.[129]

The Alabama Department of Corrections, with whom the *Gaddis*[130] plaintiffs created a private settlement agreement, might claim immunity from enforcement. Article 1, Section 14 of the Alabama Constitution provides for sovereign immunity.[131] Under Alabama law, the analysis

[125] In federal constitutional cases, capacity suits are routinely filed and are limited by at least a century of federal common law addressing the issues. For example, a State defendant can invoke sovereign immunity if sued for damages in his official capacity. Edelman v. Jordan, 415 U.S. 651, 663 (1974); *see also Ex parte* Young, 209 U.S. 123 (1908) (a state officer could not invoke sovereign immunity to avoid an injunction (from enforcing an unconstitutional legislative act)). Although *Ex parte* Young sought injunctive relief, it has been extended to suits that direct affirmative action. If an individual is sued in his personal capacity, he can assert the affirmative defense of qualified or absolute immunity. Qualified immunity analysis has typically been applied to constitutional violations. Saucier v. Katz, 533 U.S. 194, 201 (2001).

The state claims suits in state court addressed by this Note would not raise Eleventh Amendment immunity claims. Eleventh Amendment immunity doctrine is applicable to suits against a state heard in federal court on federal claims. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996); Alden v. Maine, 527 U.S. 706 (1999).

State common law interpretation often relies on federal law distinguishing between personal and official capacity suits and the type of relief sought. *See, e.g.*, State of Alaska v. Native Village of Curyung, 151 P.3d 388, 394 (Alaska 2006) (citing *Ex parte* Young for the proposition that sovereign immunity "does not apply to suits against defendants in their official capacity for prospective injunctive and declaratory relief"); Martinez v. Robinson, No. EP-04-CA-263-DB, 2006 WL 1149177, at *2 (W.D. Tex. Apr. 24, 2006) (relying on Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982), for the proposition that an official is shielded from civil liability under the doctrine of qualified immunity if acting in good faith and within his discretionary authority).

[126] Damages are typically considered legal relief. *Edelman*, 415 U.S. at 665.

[127] *Id*. Equitable relief, which is called prospective in the context of prison litigation, might ultimately require states to expend more money than it would pay out in damages.

[128] Settling prison conditions cases for money damages was and remains to be common practice. *See, e.g.*, Carranza-Reyes v. Park County Bd. of County Comm'rs, 05-CV-00377 (D.Colo. 2007) (settling jail amputation suit for $1.5 million); Tom Locke, *Carranza-Reyes case settles for $1.5 million*, FLUME (Dec. 17, 2007), *available at* http://theflume.com/main.asp?SectionID=1&SubSectionID=1&ArticleID=4795. The principal court documents in this case are also available at this cite**.**

Agreements that sought affirmative actions or enjoined negative actions, in contrast, were frequently buttressed by ongoing court enforcement of breaches through consent decrees. *See supra* Part I.A.2.

[129] Typically, the government contracts with an outside party to provide services and the government breaches by not paying. *See, e.g.*, *Ex parte* Alabama Dep't of Transp., 978 So. 2d 718 (Ala. 2007). The government does not typically contract with litigants to provide the services.

[130] *See supra* notes 109-10.

[131] ALA. CONST. Art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). Many other state constitutions provide similar immunity or such immunity is implied at common law. *See, e.g.*, ARK. CONST. Art. V, § 20 ("Sovereign immunity of the State of Arkansas"); W.VA. CONST. Art. VI, § 35 ("State Not to Be Made Defendant in

for immunity asks whether the suit "would directly affect a contract or property right of the state," as opposed to asking in what capacity a state officer is being sued.[132] If determined to be against the state, suits asking for either damages or "relief by way of mandamus or injunction" may be prohibited, extending further than the federal immunity restrictions.[133] To enforce the contract, the *Gaddis* plaintiffs would have to be careful to "name the proper state official in his or her representative capacity"[134] to proceed, likely not a party to the contract considering that ADOC lawyers signed the private settlement agreement.[135]

The Alabama state courts have carved out some exceptions to immunity.[136] In other contract contexts, requiring state agency officials to meet the terms of their contract falls under an exception for "compel[ling] a state officer to perform his or her legal duty."[137] It is questionable whether administrative actions inside a prison are comparable to the "legal duties" arising from a simple payment-for-services contract. More likely, Alabama courts will defer to prison administrators.[138]

Any Court"); Cushing v. Cohen, 420 A.2d 919, 923 (Me.1980) ("[The State of Maine] regards the immunity from suit as 'one of the highest attributes inherent in the nature of sovereignty.'"). Even where a state legislature has abrogated immunity for suit in tort or contract, it places limitations on how the suits can proceed in state court. *See, e.g.*, LA. CONST. Art. XII, § 10 ("Suits Against the State"). *Compare* Section 10(A) ("No Immunity in Contract and Tort"), *with* Section 10(C) (stating that the "legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages").

132 Mitchell v. Davis, 598 So. 2d 801, 806 (Ala. 1992).

133 Taylor v. Troy State Univ., 437 So. 2d 472, 474 (Ala. 1983); *see also* Evans v. Cotton, 770 So.2d 620 (Ala. Civ. App. 2000) (holding that inmates' claims for damages against correctional officers in their official capacities were prohibited by doctrine of absolute immunity because they were essentially claims against state); *Ex parte* Davis, 721 So. 2d 685 (Ala. 1998) (necessitating malicious, willful, or bad faith actions to prevail over the sovereign immunity defense).
For states that maintain the same distinction as federal law between impermissible damages actions and permissible actions for equitable relief against official actors, state laws that deny equitable relief are significant. When plaintiffs are left with the only means to enforce the breach as an official capacity suit for damages, their claims will then be subject to the sovereign immunity defense. *See* discussion *infra* Part II.B.2.

134 *Ex parte* Alabama Dep't of Transp., 978 So. 2d 718 (Ala. 2007).

135 Gaddis v. Campbell Agreement, at 11.

136 *Ex parte* Alabama Dep't. of Transp., 978 So. 2d at 721 (listing exceptions to sovereign immunity if a plaintiff seeks: "(1) to compel a state official to perform his or her legal duties; (2) to enjoin a state official from enforcing unconstitutional laws; (3) to compel a state official to perform ministerial acts; (4) a declaration under the Declaratory Judgments Act construing a statute and applying it in a given situation; or brings (5) a valid inverse condemnation action against State officials in their representative capacity; or (6) an action for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law.").

137 *Id.* at 721. State Highway Dep't v. Milton Constr. Co., 586 So. 2d 872 (Ala. 1991) (requiring the state to pay a construction company for "services contracted for and rendered").

138 Carpenter v. Tillman, 948 So. 2d 536, 539 (Ala. 2006) ("The certified question does not

Consequently, consent by government officials or waiver might be the only means for the *Gaddis* plaintiffs to bypass the immunity barrier. The constitutional provision prohibiting suits against the state could, in some instances, be circumvented by legislative directive.[139] However, the *Gaddis* defendants represented the Department of Corrections, an administrative agency under the executive branch.[140] While the settlement agreement could explicitly waive the defense of sovereign immunity,[141] the *Gaddis* settlement's recitation of the PLRA provision directing enforcement to state court would not likely constitute a waiver.[142] Even if a court found that recitation of the PLRA provision constituted a waiver, the prison administration might still prevail if the parties to the contract did not have authority to waive immunity.

If a plaintiff cannot cross this immunity threshold, no judicial remedy is available for a breach of contract because a state court does not have jurisdiction to hear the case. Even if, as in *Gaddis*, the litigants can establish an exception to immunity, a state defendant can litigate the issue to avoid liability.[143] Assuming that private settlement agreements

indicate whether the plaintiff has sued the DOC defendants in their official or individual capacities. However, with respect to the particular statute at issue in this case, we find the distinction irrelevant. Even if the DOC defendants have been sued in their individual capacities, they are entitled, in this case, to the protection of State-agent immunity."). *Carpenter* involved an interpretation of a statute directing inspection of prisons, and the court found that failure to inspect during a particular time period was a discretionary act entitled to immunity. *Id*. at 537. While breach of a contract is distinct, the deference given to DOC officials even over legislative directive is telling of how a court would defer to ADOC official if prisoners brought complaints.

139 *See, e.g.*, Haley v. Barbour, 885 So. 2d 783 (Ala. 2004) (permitting a court to order prison authorities to receive state inmates held in county jails because the court was following a legislative mandate).

140 The Commissioner of the Alabama Department of Corrections is appointed by the Governor. *See* http://www.doc.state.al.us/commish.asp (last visited Nov. 23, 2007). For a list of all administrative agencies in Alabama under the Executive branch, see http://info.alabama.gov/ (last visited Nov. 23, 2007).

141 Alabama v. Pugh, 438 U.S. 781, 782 (1978) (dismissing State of Alabama and Alabama Board of Corrections from the suit based on Eleventh Amendment immunity because Alabama did not consent).

142 Waiver of immunity is usually explicit. *See, e.g.*, Ibrahim v. Dist. of Columbia, 357 F. Supp. 2d 187 (D.D.C. 2004) (stating that waiver of sovereign immunity will only be found by express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction).

143 The PLRA poses another obstacle to enforcing prison conditions: additional government parties are permitted to intervene and weigh in. 18 U.S.C. § 3626 (a)(3)(F) provides:

> Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

This provision permits state officials to join the suit and oppose waiver of immunity or other terms that institutional defendants might negotiate. Some states have enacted comparable legislative provisions that permit parties to intervene. *See, e.g.*, 42 PA. CONS. STAT. § 6607

are only reached in acute situations (where the plaintiff prisoners have colorable claims of constitutional violations), the consequence of a state court denying or delaying jurisdiction on immunity grounds could be severe. While the plaintiffs reinstate their claims in federal court and prepare a record upon which the federal court can make the necessary findings, serious harm could occur. Depending on how an institutional defendant has breached the agreement, a prisoner's diabetes might go undetected and untreated, causing him, for example, to suffer a stroke or become blind.[144]

2. Specific Performance

Even if litigants successfully overcome immunity restrictions, a court might not grant a plaintiff's desired remedy: obtaining specific performance on the contract.[145] Specific performance is "fact-specific and defies neat categorization."[146] Specific performance is commonly utilized in disputes over real property[147] or other unique goods.[148] Specific performance is discretionary,[149] and limited by public policy[150]

(1998) ("In prison conditions litigation, a government party, including an elected official who was not in office at the time of the execution of the consent decree, may petition the court to modify or vacate the terms of the consent decree previously entered into. The court shall have the power and authority to void or modify the consent decree at any time upon a showing that, whether in whole or in part, it violates the provisions of this act or for other cause."); *see also infra* Part II.B.3 (discussing other state analogs to the PLRA).

144 *See, e.g.*, Gaddis v. Campbell, 301 F. Supp. 2d 1310 (M.D. Ala. 2004), *see supra* notes 108-109 and accompanying text.

145 RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 117, at § 345(b) (protecting an interested party by "requiring specific performance of a contract or enjoining its non-performance").

146 YORIO, *supra* note 105, § 1.3, at 12.

147 *See, e.g.*, Youngblood v. Ellis, 983 So. 2d 1122 (Ala. Civ. App. 2007) (affirming order granting purchaser specific performance of land sale contract).

148 Contracts for the sale of goods are governed by statutes following the Uniform Commercial Code, and present an exception to the preference for damages. *See* U.C.C. § 2-716 (1977) (granting specific performance only when damages cannot compensate because the good is non-fungible). Most other contracts are governed by state common law, with each state typically setting up specific guidelines for when specific performance *may* be the appropriate remedy.

149 Dendy v. Anchor Constr. Co., 313 So. 2d 164, 165 (Ala. 1975) (holding that specific performance is not a "matter of right"); *see also* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 117, at § 357(1) ("[S]pecific performance of a contract duty will be granted *in the discretion of the court* against a party who has committed or is threatening to commit a breach of the duty.") (emphasis added); ("An order of specific performance . . . will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract."). *Id.* at § 358(1). Because specific performance is recognized as being highly discretionary, appellate courts will be highly deferential to any trial court determination. Stringfellow Materials, Inc. v. Lee, 438 So. 2d 1387, 1390 (Ala. 1983).

150 RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 117, at § 365 ("Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of

and statute.[151] Courts prefer to award relief through damages and disfavor specific performance.[152]

Courts may grant specific performance if the contract terms are "reasonably certain."[153] The *Gaddis* settlement contains provisions that range from precise, easily-implemented and enforceable terms to more detailed and extensive provisions that defendants are more likely to breach, thus necessitating court intervention. For example, the correctional defendants and their medical contractors can readily modify their policies and procedures to comply with standards promulgated by the American Diabetes Association, as required by the settlement agreement.[154] The standards contain thorough screening and treatment requirements,[155] including documentation and recording, which are resource intensive to implement given that ADOC admits thousands of new prisoners each year.[156] Maintaining compliance with such modifications, and monitoring such practices, though, requires a longer timetable and is difficult because the agreement does not specify how to determine compliance. In addition, given the size of the incarcerated population,[157] the potential pool of affected inmates, and the

compulsion is contrary to public policy.").

151 *See, e.g.*, CAL. CIV. CODE § 3274 (West 1997) ("Species of relief. As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this Part of the Civil Code.").

152 Goodwyn, Mills & Cawood, Inc. v. Markel Ins. Co., 911 So. 2d 1044, 1051 n.8 (Ala. 2004) (citing Alabama cases since 1915 explaining that courts prefer to award damages when they provide adequate remedies). Specific performance is so discretionary because the scope and content of institutional reform contracts has historically burdened the courts. Hunt v. Stockton Lumber Co., 21 So. 454, 458 (Ala. 1896) (refusing to fix the parties' accounting on a contract where "the transactions are very numerous, complicated to some extent, and extending over many years, [so that] to undertake it would impose a burden on this court which we are not willing to assume").

153 Shacklette v. Drawdy, 816 So. 2d 486, 488 (Ala. Civ. App. 2001); *see also* Montgomery v. Peddy, 355 So. 2d 698 (Ala. 1978) (affirming trial court's order of specific performance in a dispute over a land sale where no contract terms in the agreement were left open for negotiation).

154 Gaddis v. Campbell, 301 F. Supp. 2d 1310, 1317-18 (M.D. Ala. 2004). For a court to enforce a breach of this provision, the defendants could submit revisions to their policies and procedures for a one-time evaluation of compliance. *Id.*

155 The *Gaddis* settlement requires that all incoming inmates be screened for diabetes and incoming inmates already diagnosed with diabetes must be frequently monitored. *Id*. at 1318-19. The treatment provisions require that inmates with hypoglycemia be afforded "[treatment] whenever they feel symptoms of hypoglycemia," inmates with high blood sugar and ketosis are "afforded ready access to health professional staff at any time of the day or night," and that diabetic inmates are given finger sticks to measure their glucose levels "as often as necessary for adequate diabetes control." *Id*.

156 ADOC received 7,750 new inmates in 1998. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CORRECTIONS STATISTICS, at 14 (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9805.pdf. The intake numbers for the 2006 reporting are not yet available. *See* DOJ CORRECTIONS STATISTICS 2007, *supra* note 12.

157 ADOC held 28,241 inmates as of December 31, 2006. *See* DOJ CORRECTIONS STATISTICS 2007, *supra* note 12, at 2.

thoroughness of the provisions, monitoring compliance will require significant court resources.

Enforcing compliance with the settlement agreements requires the judicial branch to closely manage prison operations, interceding in typically discretionary executive duties.[158] Numerous state constitutional and statutory provisions reject this result. For example, state constitutions often contain a separation of powers provision, which deters the judicial branch from interfering in executive and legislative functions.[159] Yet, these enforcement suits ask courts to tread heavily on both branches. Enforcement asks a judicial body to compel executive officials to enhance facilities, services, or staffing to improve unconstitutional conditions.[160] Enforcement also implicates the public fisc, requiring expenditures to be typically allocated by the legislative branch.[161] This judicial intrusion might make the contracts unenforceable or substantially unenforceable on public policy grounds.[162] If a state legislature enacts parallel legislation to this aspect

[158] Enforcement of these agreements necessitates judicial involvement in executive branch functions—exactly what the PLRA intended to end by limiting the prospective relief federal courts can offer. While the limitations on prospective relief primarily addressed federalism concerns, the goal of protecting the discretion of state prison officials broached separation of powers issues as well. *Compare* 141 CONG. REC. S14312-03 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered."), *with* 141 CONG. REC. S14408-01 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("We believe with them that it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.").

[159] *See, e.g.*, ALA. CONST. art. III, § 43 ("Separation of powers"); FLA. CONST. art. II, § 3 (maintaining distinctions between the "[b]ranches of government"). Other state courts implicitly recognize separation of powers and enforce it at common law. *See, e.g.*, State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913-14 (Alaska 2001) ("The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution. In light of the separation of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature. But under the same doctrine, we 'cannot defer to the legislature when infringement of a constitutional right results from legislative action.'") (quoting Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 972 (Alaska 1997)).

[160] The contracts between prisoner plaintiffs and institutional defendants addressed in this Note would have originally been brought in federal court, typically under Section 1983, claiming that government officials violated the Constitution.

[161] Raising revenues and allocating funds is within the legislative authority of both the federal and state governments. *See, e.g.*, U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[162] Courts must weigh various factors for and against enforcement. *Compare* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 117, § 178(2) (Factors weighing for enforcement: (a) parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, (c) any special public interest in enforcement of the particular term), *with id.* at § 178(3) (Public policy factors weighing against enforcement (a) strength of that policy as manifested by legislative or judicial decisions, (b) likelihood that a refusal to enforce term will further that

of the PLRA,[163] restraining courts from intervening in prison settlement agreements unless a judge makes a need-narrowness-intrusiveness finding, the legislature explicitly prohibits specific enforcement of these contracts.[164]

Specific performance is widely limited by state courts and legislatures, indicating that extensive litigation will be necessary to determine if prisoner breach of contract claims against prison authorities that seek specific performance may be sufficiently resolved in a state court. If a court refuses to specifically enforce either some or part of a contract, prisoners will not likely settle for compensatory damages because this remedy had already been available in federal court.[165] Litigants will then presumably reject damages and return to federal court to reinstate the underlying constitutional claim and hold hearings to establish constitutional violations and permissible remedies.

3. State Court PLRA-Analog

The PLRA provides plaintiffs the option of filing state claims in state court.[166] Theoretically, then, the PLRA shifts judicial administration of state prisons out of federal courts and into state courts. However, prisoners never relied on state courts to award broad remedies in prison reform litigation.[167] Many states have confirmed their antipathy to prisoner suits by implementing PLRA analogs with provisions strikingly similar to the federal legislation. These state

policy, (c) seriousness of any misconduct involved and extent to which deliberate, (d) directness of connection between misconduct and term).

163 *See* discussion *infra* Part II.B.3.

164 *See* discussion *supra* Part I.B.1.

165 The PLRA did not include damages in its limitations on remedies. 18 U.S.C. § 3626(g)(7) (2006) ("[T]he term 'prospective relief' means all relief other than compensatory monetary damages."). Litigants who entered into a private settlement agreement, then, sought improved prison services and facilities, not monetary compensation. This preference, and the risks in creating an unenforceable settlement agreement, is not likely to cease when prison officials are not meeting their needs. In addition, if a court decides that damages are adequate, the claims might then be subject to an immunity defense forbidding damages against a state agency. *See supra* Part II.B.1.

166 *See supra* Part I.B. (discussing 18 U.S.C. § 3626(c) and its explicit objective not to involve state law claims brought in state courts). Procedurally, if a plaintiff sued in state court under federal law, the defendant could remove to federal court and the same limitations would arise. *See* 28 U.S.C. § 1441(b) (2006) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

167 The reasons that litigants have been discouraged from asserting their rights in state court did not disappear with and might have been exacerbated by the PLRA. *See* notes 37-44 and accompanying text for traditional justifications for choosing federal courts.

analogs require inmates to exhaust administrative remedies, pay mandatory filing fees, impose penalties for frivolous suits, and limit the terms of prospective relief.[168] Provisions on fees, frivolity, and exhaustion of administrative remedies were more widely implemented than limitations on prospective relief.[169] In some states, PLRA-like legislation was enacted before the PLRA itself became federal law.[170]

State PLRA statutes present the most explicit barriers to asserting contract rights. For example, Louisiana prohibits suits by more than one prisoner, barring class actions and other "cumulated" actions.[171] Thus, even if prisoners filed as a class in federal court and settled as a class against a prison system, these contract claims will have to be individually litigated in state court. Oklahoma presents an even clearer example of a bar to enforcement of settlement agreements, forbidding all actions "in contract" against any agent related to the Department of Corrections or the state.[172] Aside from preventing jurisdiction for many contract claims, state PLRA exhaustion requirements will add significant burden and delays to litigants trying to enforce a breach. Although the claim is based on a theory of contract, it is still a claim by an incarcerated person against the state[173] and may be considered

168 *See* Schlanger, *Inmate Litigation*, *supra* note 44, at 1635 n.272 (2003) (listing states that had enacted statutes similar to the PLRA as of 2003).

169 *Id.*

170 This timing suggests either that these states were closely following Congress's actions in 1995 or that state administrators actually drafted many of the Act's key provisions. During the brief Congressional debate on the PLRA, it became clear that the PLRA was equally a state-level initiative. Not only did state attorney generals support a federal act, they had pressed these reforms in their states. *See, e.g.*, 141 CONG. REC. S7498-01 (daily ed. May 25, 1995) (statement of Sen. Dole) ("In many respects, the Prison Litigation Reform Act is modeled after the [Arizona] attorney general's own State initiative.").

171 LA. REV. STAT. ANN. § 15:1184(G) (West 2002) ("The actions of more than one prisoner may not be cumulated and a prisoner suit filed or prosecuted pro se may not assert a class action. If a suit names more than one plaintiff or asserts a pro se class action, the actions of any plaintiff, other than the first named plaintiff, shall be dismissed without prejudice.").

172 OKLA. STAT. ANN. tit. 57, § 566.4(B)(1) (West 2001) ("Neither the state, any of its agencies or boards, the Department of Corrections, any county jail, city jail, private correctional company, nor their members, agents, servants or employees shall be liable for any form of civil claim or action alleged to have arisen from any theory of contract law.").

Although it appears that no other state statute so explicitly prevents enforcement of private settlement agreements, the history of the federal PLRA and state PLRA analogs demonstrates how closely state and federal officials have worked in constructing their statutes. *See*, *e.g.*, *supra* note 170 and accompanying text. Thus, as breach of § 3626(c) settlement agreements begin to be asserted in state court, it is realistic to expect that states will simply adopt Oklahoma's formula to eliminate prison institutional reform cases that were not initiated in state court.

173 *See, e.g.*, ARK. CODE ANN. § 16-106-202(a) (West 2002) ("A civil action or claim initiated against the state, the Board of Corrections, the Department of Correction, the Department of Community Correction, another state agency . . . may be: (1) Dismissed without prejudice by the court on its own motion or on a motion of the defendant, if all administrative remedies available to the inmate have not been exhausted."); *see also* MICH. COMP. LAWS ANN. § 600.5503(l) (West 2001) (barring inmate from filing action in court until administrative remedies are exhausted).

subject to a prison's grievance system.[174]

Though limitations on prospective relief have only been adopted in few states to date,[175] most state courts do not have a history of granting broad relief to inmates beyond relieving constitutional violations.[176] This historic "hands off"[177] attitude suggests that states need not enact legislation to prevent their judges from engaging in lengthy supervision of prison conditions litigation. Where states have enacted limitations on prospective relief, it is unlikely that a litigant in a state with such limitations can circumvent these restrictions through a breach of contract claim with demands for specific enforcement.[178] This parallel legislation would serve as a strong factor for a court to consider weighing against granting specific performance.[179]

C. *Implication of Barriers for Plaintiff Prisoners and Prisoners' Rights Lawyers*

This Note's survey of current prison conditions cases reveals that carefully crafted agreements continue to be negotiated in federal court that will only be enforceable in state court. These settlement agreements indicate that the benefits of cooperation between prison administrators and plaintiff prisoners outweigh the disadvantage of dismissing the claims from federal court. Prisoners obtain a broader scope of remedies and speed in implementation.[180] For defendants, avoiding a court's finding of constitutional violations inside correctional facilities averts the stream of individual damage actions from prisoners that typically follows the court's negative finding. These purposes will continue to motivate litigants to settle prison conditions cases outside of

174 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 14.005 (1995) (referring inmates to TEX. GOV'T CODE ANN. § 501.008, inmate grievance system).

175 ALASKA STAT. § 09.19.200 (2000) (requiring relief to meet need-narrowness-intrusiveness standard); MICH. COMP. LAWS ANN. § 600.5517(1) (West 2001) (same).

176 *See supra* Part I.A.

177 *See supra* note 40 and cases cited therein.

178 Another possible restriction occurs when a state has not limited the scope of relief but has immunized state officials from having to provide certain relief. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 10/4-103 (West 2008) ("Neither a local public entity nor a public employee is liable for failure to provide a jail, detention or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, supervision or facilities therein. Nothing in this Section requires the periodic inspection of prisoners.").

179 *See supra* note 163 (discussing contracts that are unenforceable on public policy grounds).

180 Even if plaintiffs could establish constitutional violations in federal court and achieve adequate remedies within the need-narrowness-intrusiveness standard, such remedy must be re-evaluated every two years under the Act. 18 U.S.C. § 3626 (b)(1)(A)(i) makes any prospective relief terminable two years after the date the court approved it. 18 U.S.C. §3626 (b)(3) prevents this termination only if the court "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right."

federal court.[181] The frequency of these private settlement agreements also suggests that all parties, including the federal judges who ultimately sign off on the settlement agreement,[182] are mollified by the PLRA provisions that instruct litigants to raise and resolve any breaches in state court.

State enforcement of these contracts has not yet materialized. Accordingly, this Note recommends that prisoners' rights attorneys begin to bring enforcement claims when defendants breach the private settlement agreements to become more proficient in state court practices and state law. This Note's analysis of immunity laws, restrictions on specific performance, and parallel state PLRA legislation suggests that when litigants begin to bring these claims, plaintiffs will not be able to realize the exact bargain of the private settlement agreements or, in some cases, will get no relief or right to be heard in state court. Protracted litigation in state court to establish rights is inevitable but obtaining the desired relief in state court is uncertain. These preliminary conclusions should inform the negotiation and drafting of settlement agreements. Contract provisions that require defendants to explicitly waive sovereign immunity, assure that the correct institutional defendants sign the contract, or create detailed terms to help guide a state court in enforcement might avoid some of the obstacles identified in this Note.

Knowing that the agreements will not be resolved if breached, prisoners' rights attorneys might continue to champion unenforceable §3626(c) private settlement agreements as the most effective way to meet their clients' dire needs. Ultimately, a non-judicial remedy is undesirable as prisoners and their attorneys, supported by judges, prove to be most competent at ensuring that prison systems are transparent and accountable. While parties outside of the institutional reform litigation context could provide relief,[183] the executive and legislative branches of both the state and federal government have proven unwilling to adequately uphold the constitutionality and humanity of state prison

181 *See supra* notes 75-78.

182 Judges are also tasked with protecting classes of institutional plaintiffs during settlements and should acknowledge potential barriers to state court enforcement to assure that plaintiff prisoners understand the repercussions of their bargain. *See* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.").

183 The legislative and executive branches of the state and federal government also have jurisdiction to monitor prisons. For example, the Civil Rights of Institutionalized Persons Act ("CRIPA") grants the U.S. Attorney General standing to sue state institutions for constitutional violations. However, Holt describes how the Reagan administration's policy goals obstructed her ability to implement CRIPA when she worked at the Civil Rights Division of the U.S. Department of Justice. *See* KAREN E. HOLT, WHEN OFFICIALS CLASH: IMPLEMENTATION OF THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT 21-60 (1998).

systems.[184] Litigants might return to federal court to proceed with extensive evidentiary hearings to establish constitutional violations and create remedies that meet the need-narrowness-intrusiveness standard.[185]

Prisoners' rights attorneys can use examples of failed state court enforcement and worsening prison conditions as an advocacy tool to help repeal the Act's limitations on prospective relief. On November 7, 2007, Representatives Robert Scott and John Conyers introduced an amendment to remove the need-narrowness-intrusiveness limitation from consent decrees, returning judicial discretion in remedying prison abuses.[186] While returning discretion to federal courts will continue to face major opposition from states, the proposed amendment and accompanying legislative hearings[187] provide an opportunity to reveal the problems with the Act. If litigants return to federal court after failing to obtain relief in state court or refuse to continue creating private settlement agreements, the fiscal consequences could be tremendous. More resources might be used in both state and federal court untangling and litigating the private settlement agreements than would be spent enforcing them. Equally as important, the consequence of resolving acute situations and having the resolutions breached could bring disastrous health, sanitation, safety, and other constitutional

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184 While federal court intervention need not bring about humane conditions in state prisons, the other state branches often prove unwilling to take responsibility. *See, e.g.*, Baer & Bepko, *supra* note 46, at 4.

> [W]hen it comes to institutions such as the New York City jails and protections for its powerless population, it is unlikely that either of the other two branches of government are [sic] prepared to make such a mission a priority or to provide the necessary—and sometimes tedious—oversight. . . . Unfortunately, the fact is that legislators are, for the most part, advocates for their constituents and for causes they choose to champion. Attention to prisoners and their rights are not causes high on the list.

Id.

185 This outcome is contrary to one of the major goals of the Act, reducing the burden on the federal docket. However, the Act's limited review on the Senate floor reveals that the Senate had been briefed that the Act might further overload federal courts if litigants chose to remain in federal court under the Act's limitations. *See* 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) (referring to the potential increase in litigation costs that the federal court system could face):

> [T]he Administrative Office of the United States Courts . . . found that the "'potential annual resource costs of (the bill) could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers—Article III judges and/or magistrate judges." The bill appropriates no funds to the Federal judiciary to offset this enormous fiscal impact.

Id. If state prisoners return to federal court, the Act limits relief to narrow and short-term judicial supervision of conditions.

186 *See* 110 CONG. REC. HR4109 (daily ed. Nov. 7, 2007) (statement of Rep. Scott) (introducing the Prison Abuse Remedies Act of 2007, which included a provision to strike paragraph (1) of 18 U.S.C. § 3626(c) which made consent decrees comply with the need-narrowness-intrusiveness standard). The Congressional record is available at http://www.savecoalition.org/newdev/HR_4109.pdf.

187 *See supra* note 36.

damages to prisoners.

CONCLUSION

To relieve state prison systems from the burden of federal court management, the Prison Litigation Reform Act limits the equitable jurisdiction and remedial powers of federal judges. These limitations compel plaintiff prisoners and institutional defendants to bargain outside of federal court. This scheme assumes some faith that litigants will have a means of asserting their rights in state court.[188] If state courts are closed to prison litigation, the Act creates an ineffective enforcement scheme[189] that generates more litigation without resolving the underlying complaint, allows grave prison problems to deteriorate, and increases the docket of prison condition cases to be litigated in federal court. While prisoners retain their right to be free from substandard and degrading conditions and to contract to uphold these rights under the PLRA, state courts will frequently provide no remedy for violation of these rights. Protecting the right to remedy is essential to protecting underlying rights.

[188] *Compare* § 3626(c), *with* § 1997e(b) ("The failure of a state to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997e of this title."). The exhaustion provisions of the PLRA were passed simultaneously with the limitations on prospective relief provisions. There, Congress had no trouble finding that a lack of administrative or state remedies would not suffice to constitute an actionable cause in federal court.

[189] This scheme is only ineffective if the defendant breaches the contract—a likely outcome considering the history of institutional reform litigation. *See* discussion *infra* note 34 and accompanying text.